

R

UNIVERSITI MALAYA

ORIGINAL LITERARY WORK DEPARTMENT

HADIAH/GIFT

**THE PRESUMPTION OF INNOCENCE UNDER ANTI-TERRORISM LAWS: A COMPARATIVE STUDY OF THE LAWS IN MALAYSIA AND ENGLAND AND WALES**

**LAZARUS JANSEN XAVIER BENNY**

PERPUSTAKAAN UNDANG-UNDANG  
UNIVERSITI MALAYA

Perpustakaan Universiti Malaya



A512970093

**An Academic Project submitted in partial fulfilment for the Degree of Master of Criminal Justice**

**2006**

# UNIVERSITI MALAYA

## ORIGINAL LITERARY WORK DECLARATION

Name of Candidate: LAZARUS JANSEN (I.C/Passport No: 740209-14-5117)

Registration/Matric No: L9C030005

Name of Degree: MASTER OF CRIMINAL JUSTICE

Title of Project Paper/Research Report/Dissertation/Thesis ("this Work"):

THE PRESUMPTION OF INNOCENCE UNDER  
ANTI-TERRORISM LAWS: A COMPARATIVE  
STUDY OF THE LAWS IN MALAYSIA AND ENGLAND  
AND WALES

Field of Study: CRIMINAL LAW/EVIDENCE

I do solemnly and sincerely declare that:

- (1) I am the sole author/writer of this Work;
- (2) This Work is original;
- (3) Any use of any work in which copyright exists was done by way of fair dealing and for permitted purposes and any excerpt or extract from, or reference to or reproduction of any copyright work has been disclosed expressly and sufficiently and the title of the Work and its authorship have been acknowledged in this Work;
- (4) I do not have any actual knowledge nor do I ought reasonably to know that the making of this work constitutes an infringement of any copyright work;
- (5) I hereby assign all and every rights in the copyright to this Work to the University of Malaya ("UM"), who henceforth shall be owner of the copyright in this Work and that any reproduction or use in any form or by any means whatsoever is prohibited without the written consent of UM having been first had and obtained;
- (6) I am fully aware that if in the course of making this Work I have infringed any copyright whether intentionally or otherwise, I may be subject to legal action or any other action as may be determined by UM.

Candidate's Signature

Date 18/08/06

Subscribed and solemnly declared before,

Witness's Signature

Date

Name:  
Designation:



## ACKNOWLEDGMENT

In the course of researching and writing this paper, various people have provided invaluable help and encouragement. Thus, I would like to thank my supervisor, En Abdul Samad from the Faculty of Law, University Malaya, for his patient guidance and valuable comments in the course of supervising this research. Special thanks also go to the staff of Faculty of Law for their kind assistance in various circumstances.

I am also grateful to many others not mentioned here for their willingness to share their knowledge about the presumption of innocence under anti-terrorism laws and matters connected therein throughout the period of research. However, my greatest debt is to my family especially my parents, Mr. Xavier Benny and Mrs. Fatimah Anthony, for their unconditional love and support. Thus, this research is specially dedicated to my family for always believing in me.

## ABSTRACT

This paper is about the presumption of innocence under anti-terrorism laws and is undertaken in a comparative manner, examining the laws of Malaysia, and England and Wales, hence, the influence of English common law in our legal system. The presumption of innocence is regarded as the cornerstone of the criminal justice system and operates throughout the criminal process. Thus, it is observed that the right to be presumed innocent forms an effective theoretical safeguard which reflects due process of law.

In this research, upon examining the presumption of innocence under anti-terrorism laws, it is observed that this pillar of criminal justice system is curtailed extensively under such laws. The study shows that preventive detention under anti-terrorism laws curtail the rights of an accused person to a fair trial. Thus, in the absence of an opportunity to prove innocence in a court of law, what entails is potential abuse of power by enforcement authorities disregarding adherence to procedural rights, specifically the right to counsel. This is further reflected as in most cases, detainees under such laws are tortured and abused for an alleged offence based on suspicion. Hence, the role of the judiciary is emphasised, as they are regarded as bulwark of fundamental liberties. The question of determining guilt should not be left at the hands of the Executive, but on the safe hands of the Court.



## TABLE OF CONTENTS

Chapter 4: Anti-Terrorism Laws	26
4.0 Introduction	26
Acknowledgement	i
Abstract	ii
Table of Contents	iii
Table of Cases	v
Table of Statutes	viii
4.3 The Application of the Presumption under Sections 8 and 73 of the ISA 1960	33
<b>Chapter 1: Introduction</b>	
1.0 Overview	1
1.1 Objectives and Significance of the Study	4
1.2 Research Methodology	4
1.3 Organisation of the Chapters	4
1.4 Conclusion	7
<b>Chapter 2: Presumption of Innocence</b>	
2.0 Introduction	8
2.1 The Universality of the Presumption of Innocence	9
2.2 The Presumption of Innocence an Effective Safeguard under Ordinary Laws	11
2.3 The Presumption of Innocence in Malaysia	12
2.4 The Presumption of Innocence in England and Wales	15
2.5 Presumption of Innocence under Selected Jurisdiction	16
2.6 Conclusion	17
<b>Chapter 3: Presumption of Innocence and Terrorism Laws</b>	
3.0 Introduction	18
3.1 Terrorism Defined	20
3.1.1 Definition of Terrorism in Malaysia	21
3.1.2 Definition of Terrorism in England and Wales	22
3.2 Conclusion	24
<b>Chapter 6: Conclusion</b>	
6.0 Conclusion	86
Bibliography	92

**Chapter 4: Anti-Terrorism Laws in Malaysia**

4.0 Introduction	26
4.1 Anti-Terrorism Laws	28
4.2 The Presumption of Innocence under the ISA 1960	29
4.2.1 Section 73 of the ISA 1960	30
4.2.2 Section 8 of the ISA 1960	32
4.3 The Application of the Presumption under Sections 8 and 73 of the ISA 1960	33
4.3.1 Safeguards a Reflection of the Presumption of Innocence	38
4.3.1.1 The Advisory Board: Section 11 of the ISA 1960	38
4.4 Right to Counsel under the ISA 1960	41
4.5 Conclusion	55

**Chapter 5: Anti-Terrorism Laws in England and Wales**

5.1 Introduction	57
5.2 A Human Rights Culture	58
5.3 Anti-Terrorism Laws in England and Wales	60
5.4 Presumption of Innocence under the ATCSA 2001	61
5.4.1 Part 4 of the ATCSA 2001	62
5.4.2 Safeguards: A Reflection of the Presumption of Innocence	64
5.4.2.1 The Special Immigration Appeals Commission	65
5.4.2.2 Public Emergency Requirement under Article 15 of the Convention	67
5.4.2.3 Effective Judicial Review	69
5.4.2.4 Parliamentary Scrutiny	70
5.5 The Presumption of Innocence under the PTA 2005	71
5.5.1 Section 2 of the PTA 2005: Non-Derogating Orders	73
5.5.2 Safeguards: A Reflection of the Presumption of Innocence	76
5.5.2.1 Supervision of the Court	76
5.6 Right to Counsel under Anti-Terrorism Laws	79
5.7 Conclusion	84

**Chapter 6: Conclusion**

6.0 Conclusion	86
----------------	----

<b>Bibliography</b>	92
---------------------	----



## TABLE OF CASES

### A

Arulpragasam a/l Sandaraju (1997) 1 MLJ 1  
Allenet de Ribermont v France (1995) 20 EHRR 557  
Abdul Ghani Haroon v Ketua Polis Negara & Anor Application (2001) 2 MLJ 689  
A (FC) and others (FC) (Appellants) v Secretary of State for the Home Department (Respondent), X (FC) and another (FC) (Appellants) v Secretary of State for the Home Department (Respondent) (2004) UKHL 56

### B

Brogan v United Kingdom (1988) 11 EHRR 117

### C

Chan Kim Choi v PP (1989) 1 M.L.J. 404  
Che Ani Itam v Public Prosecutor (1984) 1 MLJ 113  
Coffin v United States 156 U.S. 432, 453 (1895)  
Chrysostomos, Papachrysostomou and Loizidou v Turkey (1991) 68 D.R.216  
Chahal v United Kingdom (1996) 23 EHRR 403  
Clingham v Kensington and Chelsea LBC and R (McCann and others) v Manchester Crown Court (2002) UKHL 39

### D

Di Stefano v United Kingdom (1989) 60 D.R. 182

### E

Escobedo v Illinois (1964)

### H

Hobson 1 Lew CC 261  
Hashim bin Saud v Yahya & Anor (1977) 1 M.L.J. 259  
Haw Tua Tau v Public Prosecutor & Associated Appeals (1981) 2 MLJ 49

### I

Imbroscia v Switzerland (1994) 17 E.H.R.R. 441

### J

Jayaraman & Ors v PP (1982) 2 M.L.J. 306

### K

Krishnan v PP (1987) 1 M.L.J. 292

Kekatong Sdn Bhd v Danaharta Urns Sdn Bhd (2003) 3 CLJ 378  
Khoon Chye Hin v Public Prosecutor (1961) 27 MLJ 105 at 108  
Kanda v Government of the Federation of Malaya (1962) MLJ 169  
Kerajaan Malaysia & Ors v Nasharuddin bin Nasir (2003) 1 CLJ 345, 348  
Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia (1969) 2 MLJ 129  
Kang Ho Soh (1992) 1 M.L.J. 360

## **L**

Loh Kooi Choon v Government of Malaysia (1977) 2 MLJ 188  
Lee Mau Seng v Minister for Home Affairs, Singapore & Anor (1971) 2 M.L.J 137  
Lawless v Ireland (1961) 1 ECHR 1  
Liversidge v Anderson (1942) AC 206  
Lim Kit Siang v Dato' Seri Dr Mahathir Mohamad (1987) 1 MLJ

## **M**

Murray v United Kingdom (1996) EHRR 29  
Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals (2002) 4 MLJ 449  
Miranda v Arizona 384 US 436 (1966) USSC

## **N**

Noor Ashid bin Sakib v Ketua Polis Negara (2002) 5 MLJ 22

## **O**

Ong Ah Chuan v PP (1981) 1 MLJ 64  
Ooi Ah Phua v Officer in Charge of Criminal Investigation, Kedah/Perlis (1975) 1 MLJ 93

## **P**

Public Prosecutor v Mah Chuen Lim and Others (1975) 1 MLJ 95

## **R**

Re The Detention of R. Sivarasa and Ors (1996) 3.M.L.J. 611  
R v DPP, ex parte Kebilene (1999) 3 WLR 972  
Re Inspector-General of Police v Tan Sri Raja Khalid bin Raja Harun (1988) 1 MLJ 182  
Ramli bin Salleh v Inspector Yahya bin Hashim (1973) 1 MLJ 54  
R v Samuel (1988) Q.B.615

## **S**

Salleh bin Saad v PP (1983) 2 M.L.J. 164  
Sundar Singh v Emperor, AIR 1930 Lahore 945



Sudha Sindhu Dey v Emperor (1935) AIR Cal. 101  
 S v Switzerland (1991) 14 E.H.R.R. 670  
 Soering v United Kingdom (1989) 11 ECHRR 439  
 Shee Chin Woh (1998) 5 M.L.J. 429

**T**  
 Anti-Terrorism Crime and Security Act 2001  
 Aviation Offences Act 1984 (Act 307)  
 Theresa Lim Chin Chin & Ors v Inspector General of Police (1988) 1 MLJ 293

**U**  
 Criminal Procedure Code (Act 593, Revised 1999)  
 US v Salerno 481 US 739 (1987)

**W**  
 Criminal Procedure Code (F.M.S. Cap. 6)  
 Criminal Justice (Terrorism and Conspiracy) Act 1998  
 Woolmington v DPP (1935) AC 462  
 Criminal Justice and Public Order Act 1994

**D**  
 Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316)  
 Dangerous Drugs Act 1952 (Act 234, Revised 1980)  
 Dangerous Drugs (Amendment) Act 1984 (Act A396)  
 Declaration of the Rights of Man and of the Citizen of France  
 Declaration on the Protection of All Persons from Being Subject to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

**E**  
 Emergency (Public Order and Prevention of Crime) Ordinance 1969  
 European Convention on Human Rights 1951  
 Emergency (Essential Powers) Act 1979 (Act 216)  
 Essential (Security Cases) (Amendment) Regulation 1975 (P.U. (A) 362)

**F**  
 Federal Constitution of Malaysia  
 Federal Constitution of the United States

**H**  
 Human Rights Commission of Malaysia Act 1999 (Act 597)  
 Human Rights Act 1998

**I**  
 Internal Security Act 1960 (Act 82, Revised 1972)  
 Interpretation Act 1967 (Act 388, Consolidated and Revised 1989)  
 International Covenant on Civil and Political Rights  
 Intelligence Services Act 1994  
 Immigration Act 1971 (c. 77)

## TABLE OF STATUTES

### A

Anti-Terrorism Crime and Security Act 2001  
Aviation Offences Act 1984 (Act 307)

### C

Criminal Procedure Code (Act 593, Revised 1999)  
Canadian Charter of Rights and Freedoms  
Criminal Procedure Code (S.S. cap. 21)  
Criminal Procedure Code (F.M.S. Cap. 6)  
Criminal Justice (Terrorism and Conspiracy) Act 1998  
Criminal Evidence (Northern Ireland) Order 1988  
Criminal Justice and Public Order Act 1994

### D

Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316)  
Dangerous Drugs Act 1952 (Act 234, Revised 1980)  
Dangerous Drugs (Amendment) Act 1984 (Act A596)  
Declaration of the Rights of Man and of the Citizen of France  
Declaration on the Protection of All Persons from Being Subject to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

### E

Emergency (Public Order and Prevention of Crime) Ordinance 1969  
European Convention on Human Rights 1951  
Emergency (Essential Powers) Act 1979 (Act 216)  
Essential (Security Cases) (Amendment) Regulation 1975 (P.U. (A) 362)

### F

Federal Constitution of Malaysia  
Federal Constitution of the United States

### H

Human Rights Commission of Malaysia Act 1999 (Act 597)  
Human Rights Act 1998

### I

Internal Security Act 1960 (Act 82, Revised 1972)  
Interpretation Act 1967 (Act 388, Consolidated and Revised 1989)  
International Covenant on Civil and Political Rights  
Intelligence Services Act 1994  
Immigration Act 1971 (c. 77)



## L

Legal Profession Act 1956 (Act 166)

## N

Northern Ireland (Emergency Provisions) Acts 1973-1998

Nationality, Immigration and Asylum Act 2002

## P

Prevention of Terrorism Act 2005

Prevention of Terrorism Act (Temporary Provisions) 1989

Penal Code (Act 593)

Penal Code (Amendment) Act 2003 (Act A1210)

Prevention of Violence (Temporary Provisions) Act 1939

Police and Criminal Evidence Act 1984

## T

Terrorism Act 2000

Terrorism Bill 2005

## U

Universal Declaration of Human Rights 1948

United Nations Security Council, Resolution 1373

United Nations Standard Minimum Rules for the Treatment of Prisoners

United Nations Convention on the Status of Refugees 1951

## Y

Youth Justice and Criminal Evidence Act 1999

<sup>1</sup> Malaysia, as one of the former colonies of Britain and having obtained independence from the latter, adopted a Westminster model, thereby incorporating to some extent, constitutional practices established by the English legal system. For further reading see: Tan, Yee & Lee's *Constitutional law in Malaysia & Singapore* (2<sup>nd</sup> ed); Kevin VL Tan, *Three Liars, Pseudo-Principles And* (1997) at pp. 36-73.

<sup>2</sup> *Coffin v United States* 1961, 7 F. 432, 433 (1961).

<sup>3</sup> In promoting and enhancing the protection of such rights, a Human Rights Commission was set up in 1999 under the *Human Rights Commission of Malaysia Act 1999* (Act 592). The Act provides for the establishment of the said Commission, setting out powers and functions of the Commission for the protection and promotion of human rights in Malaysia.

## CHAPTER 1

### INTRODUCTION

#### 1.0 Overview

This paper attempts to examine the doctrine of the presumption of innocence under anti-terrorism laws in a comparative aptitude of the legal systems of Malaysia, and England and Wales. The comparative study is essential in order to identify and highlight the divergence and drawbacks of the aforesaid legal systems under study, hence, the long standing Commonwealth relationship between Malaysia and England and Wales.<sup>1</sup>

The presumption of innocence is found in every modern democratic society and its enforcement lies at the foundation of the administration of our criminal law.<sup>2</sup> The right to be presumed innocent is accorded to an accused person throughout the criminal process and therefore, it operates at both pre-trial and trial stages.

Further *Part II of the Federal Constitution of Malaysia* (hereinafter the '*Federal Constitution*') is an important declaration and instrument of human rights in Malaysia. The rights accorded under the *Federal Constitution* enable an accused person to challenge actions of the State if they fail to match the standards set by it. The membership of Malaysia in the United Nations is also a proclamation of its desire to achieve the promotion of universal respect for and observance of human rights.<sup>3</sup>

---

<sup>1</sup> Malaysia, as one of the former colonies of Britain and having obtained independence from the latter, adopted a Westminster model, thereby incorporating to some extent, constitutional practices established by the English legal system. For further reading see: Tan, Yeo & Lee's, *Constitutional law in Malaysia & Singapore* (2<sup>nd</sup> ed). Kevin YL Tan, Thio Li-ann, Butterworths Asia (1997) at pp. 36-55

<sup>2</sup> *Coffin v United States* 156 U.S. 432, 453 [1895]

<sup>3</sup> In promoting and enhancing the protection of such rights, a Human Rights Commission was set up in 1999 under the *Human Rights Commission of Malaysia Act 1999* (Act 597). The Act provides for the establishment of the said Commission, setting out powers and functions of the Commission for the protection and promotion of human rights in Malaysia.



However, with the tremendous expansion of State powers, it seems evident that the rights of the accused person are increasingly being impinged. So much so, that the idea of a 'human rights culture' promulgated 50 years ago seems depraved. The Malaysian Parliament over the years had passed various laws like the *Internal Security Act 1960* (hereinafter the '*ISA 1960*'),<sup>4</sup> the *Emergency (Public Order and Prevention of Crime) Ordinance 1969* (hereinafter the '*EO 1969*'),<sup>5</sup> and the *Dangerous Drugs (Special Preventive Measures) Act 1985* (hereinafter the '*DDA-SPM 1985*')<sup>6</sup> which, has significantly challenged the fundamental liberties of an accused person.

Apart from the *ISA 1960*, although the *EO 1969* and the *DDA-SPM 1985* was enacted to counter different problems,<sup>7</sup> nevertheless, both empower indefinite detention, akin to powers under the *ISA 1960*.<sup>8</sup> Such laws are therefore open for potential abuse especially with the police in carrying out their investigation. In the absence of effective safeguards,<sup>9</sup> there is risk of torture or ill treatment of suspects during detention.<sup>10</sup> But the laws are there and the justification is that they are necessary for the security and welfare of the society.

---

<sup>4</sup> See Chapter 4: Anti-Terrorism Laws in Malaysia

<sup>5</sup> The *EO 1969* was issued for the purpose of restoring peace and order in the aftermath of the state of emergency proclaimed in the 1969 racial riots. Amnesty International, Malaysia: Towards Human Rights-Based Policing, 7<sup>th</sup> April 2005 at p. 10 (<http://web.amnesty.org/library/index/ENGASA280012005>)

<sup>6</sup> *Id.* 11, The *DDA-SPM 1985* was passed pursuant to *Article 149 of the Federal Constitution*, which empowers the police officer to arrest without warrant any person suspected of any form of involvement in drugs trafficking.

<sup>7</sup> *Ibid*

<sup>8</sup> These laws empower the police to detain any suspect for up to 60 days and thereafter the Minister can issue a two year detention order, renewable indefinitely based on the findings of the police.

<sup>9</sup> Under the *EO 1969*, the police are not required to obtain a remand detention order from a magistrate, thus, effectively curtailing judicial safeguard. Further, under the *DDA-SPM 1985*, the effectiveness of the Inquiry Officer's role is doubted and there are other effective drug laws that a suspect can be charged with, which include; the *Dangerous Drugs Act 1952* (Act 234, Revised 1980) and the *Dangerous Drugs (Amendment) Act 1984* (Act A596).

1.1.06 This paper will discuss on the presumption of innocence and articulate that anti-terrorism laws have significantly eroded this presumption of innocence. These laws are focused at preventing future conduct rather than to detain until trial or to punish or correct an offence which has already been committed.<sup>11</sup> Thus, such laws change the way as to how criminal law should be administered; that is in accordance to credible admission of evidence, upon the satisfaction of a court of law beyond reasonable doubt, and not based on reasonable suspicion.<sup>12</sup>

1.2.06 Although acts of terrorism should be outright condemned, States have legal obligation to take effective measures to counter such acts, which must be done, in accordance to legal norms and nothing short should suffice as liberties of individuals are at stake. Therefore, the purpose of undertaking this research is to emphasize that the presumption of innocence should not be compromised under anti-terrorism laws. It is difficult to ascertain the extent of the legitimacy of such laws, as it was encountered that the nature and the application of anti-terrorism laws evolve during time. Terrorism itself is broadly defined as legislators find it futile to have one universal accepted definition. We cannot ignore against the fact that the root of terrorism involves variables that may include political strategies, sensitivity of religion, and poverty among others. Therefore, the law has a mounting task to balance the interest to protect the safety of the nation and the interest of an accused person.

---

<sup>10</sup> Amnesty International, *Loc. Cit.*

<sup>11</sup> Steven Greer, Preventive Detention and Public Security-Towards a General Model, at p. 25. (Andrew Harding & John Hatchard, Preventive Detention & Security Law. A Comparative Study: International Studies in Human Rights. Volume 31. Martinus Nijhoff Publishers)

<sup>12</sup> Andrew Harding & John Hatchard, Preventive Detention & Security Law. A Comparative Study: International Studies in Human Rights. Volume 31. Martinus Nijhoff Publishers, at p 6



## 1.1 Objectives and Significance of the Study

It is submitted that the objective of this research is to contribute to the knowledge and better understanding of the presumption of innocence under anti-terrorism laws. Hence, this study would enable us to question the implication of preventive detention and the ensuing denial of the right to counsel in light of the right to be presumed innocent

## 1.2 Research Methodology

The research is conducted in a comparative manner of the laws of Malaysia, and England and Wales. Both these countries to some extent, share a common criminal justice system premised on a Westminster model. The research has primarily been carried out in the Law Libraries in Malaysia, particularly at the University Malaya, which has provided valuable information and materials pertaining to the area of study. Thus, the data collections are generally based on text books, journals, documents, other written materials, and internet sources.

## 1.3 Organisation of the Chapters

The chapter of this research would be organised as below:

### 1.3.1 Chapter one

This chapter deals with matters encountered in the process of compiling and writing this project paper, particularly the scope of study, analysis of the central issues and the central theme of the aforesaid project paper

### 1.3.2 Chapter two

This chapter will provide a non-exhaustive perspective of the presumption of innocence. It will be emphasised that the presumption of innocence is regarded as the ultimate safeguard offered to suspects which, if not observed may lead to potential miscarriage of justice. Thus, the presumption of innocence is regarded as a universal concept which is reflected in the criminal justice system. The application of which will be examined in the context of the legal systems of Malaysia, and England and Wales, together with other selected jurisdiction.

### 1.3.3 Chapter three

This chapter will demonstrate how preventive detention under anti-terrorism laws erodes the presumption of innocence. Under these laws an accused person on suspicion of links to 'terrorism' may be held without any criminal charge or trial and in the course of being detained for the said alleged activity, denied access to legal counsel. Such detention often disregard due process of law, which, is a fundamental principle in the *Federal Constitution* as there is no opportunity at all for a detainee to prove his innocence as trial in a court of law is never envisaged.

### 1.3.4 Chapter four

This chapter examines the terrorism laws in Malaysia, with specific reference to the *ISA 1960*. The *ISA 1960* empowers police authorities to detain a person without any warrant of arrest for a period of up to 60 days. It also empowers the Executive to order a detention for a period not exceeding two years but renewable, thereafter, indefinitely. The exercise of powers under the *ISA 1960* may amount to violation of fundamental rights effecting the presumption of innocence enshrined in the *Federal Constitution* pursuant to *Article 5(1)* which ensures that no person is deprived of his life or personal liberty, save in accordance with law. Further, the accused being



detained under such circumstances may be denied of his right to counsel which bearing in mind is an enshrined right accorded under *Article 5(3) of the Federal Constitution*.

### 1.3.5 Chapter five

This chapter deals with terrorism laws in England and Wales, specifically in relation to the *Anti-Terrorism Crime and Security Act 2001* (hereinafter the '*ATCSA 2001*') and the *Prevention of Terrorism Act 2005* (hereinafter the '*PTA 2005*').<sup>13</sup> The initiation of the *ATCSA 2001* was to enhance the scope of powers of the Police to investigate and prevent terrorist activity, but most of all; the *ATCSA 2001* introduced indefinite detention only applying to non-UK nationals. The *PTA 2005* instituted control orders which can be imposed against any terrorist suspect, whether an UK national or a non-UK national, or whether the terrorist activity is international or domestic. Therefore these provisions under the *ATCSA 2001* and the *PTA 2005* may infringe the presumption of innocence.

### 1.3.6 Chapter six

This chapter will conclude by examining the role of the judiciary as protectors of individual rights and liberties. However, in Malaysia this is short-lived, as the Government over the years had made significant amendments to the *ISA 1960* thereby completely removing judicial safeguards. However, this was not the only reason for the existing predicament, as lack of sound judicial decision was also a contributory factor.

Some form of reforms is proposed along the passages which include, inter alia, the creation of a Constitutional Court to hear matters concerning fundamental rights. Reform is urgently needed in this area as what we do not like to see is the long hands

<sup>13</sup> Apart from the *ATCSA 2001*, other prevailing terrorism laws would include the *Terrorism Act 2000* and the proposed *Terrorism Bill 2003*. Note, for the present discussion only the *ATCSA 2001* and the *PTA 2005* is relevant.

of the executive acting without due regard to the law. This is where it is reiterated that the role of the judiciary becomes imperative above all in protecting the rights of the accused from both arbitrary Executive action and actions of law enforcement agencies. Herein lies the duty of the court to be the guardian of the Constitution and not otherwise a slave to executive powers.

#### 1.4 Conclusion

It is reiterated that this paper is undertaken in a comparative manner, examining the significance of the presumption of innocence under anti-terrorism laws of Malaysia, and England and Wales. In having laid the relevant chapters, we now examine the presumption of innocence.

However, this right to be presumed innocent is not only confined to trial stage but it also extends to pre-trial stage. The fundamental right to be presumed innocent as Dworkin contends, is based on two rights that form the basis of presumption of innocence; the right to procedures that place a proper valuation on moral harms and, second, the right to consistent treatment throughout the criminal justice system.<sup>13</sup> Thus, the presumption of innocence is regarded, as the cornerstone of the administration of criminal justice system that to deny the very substance is to ultimately deny the very polestar that facilitates due process of the law.<sup>14</sup> Due process embraces procedural and substantial safeguards within the criminal process as to ensure prevention and elimination of mistakes to the extent possible and as Fisher

<sup>13</sup> William E. Shaffer, *Commentaries on the Laws of England*, vol. 4, of Public Wrongs (1769), 372.

<sup>14</sup> Apart from the aforesaid, other prevailing terrorism laws would include the *Terrorism Act 2000* and the proposed *Terrorism Bill 2005*. Note: for our present discussion only the *ATCSA 2001* and the *PTA 2005* is relevant.



## PRESUMPTION OF INNOCENCE

## 2.0 Introduction

The right to be presumed innocent has become analogues with the Blackstonean maxims that *'it is better that ten guilty persons escape, than that one innocent suffer.'*<sup>14</sup> In fact this principle uncovers that under criminal law a person is presumed innocent until proven guilty. It follows, therefore, that the burden of proving the defendant's guilt lies on the prosecution to proof beyond reasonable doubt the necessary elements of crime; that is having to prove that the accused committed the act and having done so with the requisite criminal intent.<sup>15</sup> Thus, the presumption of innocence requires that any imputation of guilt is only to be determined upon submission of evidence presented in a court of law.

However, this right to be presumed innocent is not only confined to trial stage but it also extends to pre-trial stage. The fundamental right to be presumed innocent as Dworkin contends, is based on two rights that form the basis of presumption of innocence; the right to procedures that place a proper valuation on moral harms and, second, the right to consistent treatment throughout the criminal justice system.<sup>16</sup> Thus, the presumption of innocence is regarded, as the cornerstone of the administration of criminal justice system that to deny the very subsistence is to ultimately deny the very polestar that fashions due process of the law.<sup>17</sup> Due process embraces procedural and theoretical safeguards within the criminal process so as to ensure prevention and elimination of mistakes to the extent possible and as Packer

<sup>14</sup> William Blackstone, Commentaries on the Laws of England, vol. 4, of Public Wrongs (1769), 352.

<sup>15</sup> *Woolmington v DPP* [1935] AC 462

<sup>16</sup> Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) at p. 13

<sup>17</sup> Herbert L. Packer, *The Limits of the Criminal Sanction* (1978) Stanford University Press (1978) at p. 161



contends, due process resembles a factory that has to devote a substantial part of its input to quality control.<sup>18</sup>

Thus, presumption of innocence is regarded as the ultimate theoretical safeguard<sup>19</sup> offered to suspects, which, if not observed may lead to potential miscarriage of justice.<sup>20</sup> The presumption of innocence is an all-conquering right that serves to protect an accused person in granting them the absolute right to be summoned, to have their case heard in an open court, to have legal counsel, to have their sentence pronounced publicly, and to present evidence in their defence. Thus, the maxim extends to mean, “no one, absolutely no one, can be denied a trial under any circumstances” and that everyone, absolutely everyone, had the right to conduct a vigorous, thorough defence.<sup>21</sup> Therefore, the notion of innocent until proven guilty is a widely accepted principle of due process of law, which is inherent in most legal systems.

Article 6 of the Convention.<sup>22</sup> In fact such treaties when incorporated into domestic

## 2.1 The Universality of the Presumption of Innocence

The presumption of innocence is accorded universal recognition by virtue of *Article 11 (1) of the Universal Declaration of Human Rights 1948* (hereinafter the ‘UDHR 1948’), which reads:

*“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”*

---

<sup>18</sup> *Id.* 164-165

<sup>19</sup> Procedural safeguards on the other hand would include among others, caution statements; remand period; the exclusion of illegally obtained evidence and the right to counsel

<sup>20</sup> Andrew Sanders and Richard Young, *Criminal Justice* (2<sup>nd</sup> ed., 2000) Butterworth, at p. 10



1.2 The presumption of innocence is also reflected in *Article 6 (2) of the European Convention on Human Rights 1951* (hereinafter the ‘*Convention*’) which is binding on all members of the Council of Europe, including all Member States of the European Community. The provision reads that:

“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”.

In *Murray v United Kingdom*,<sup>22</sup> the European Court of Human Rights stated clearly that there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination lie at the heart of the notion of a fair procedure under *Article 6 of the Convention*. Such protection against improper compulsion by the authorities can avoid miscarriage of justice and ultimately secure the aims of *Article 6 of the Convention*.<sup>23</sup> In fact such treaties when incorporated into domestic law make significant change to the legal system of Member States.

Lord Hope in *R v DPP, ex parte Kebilene*,<sup>24</sup> in regards to England and Wales incorporating Convention rights into domestic law, states that the said incorporation will subject the entire legal system to a fundamental process of review and, where necessary, reform by the judiciary.<sup>25</sup> Thus, the presumption of innocence is regarded as a customary universal concept accorded to an accused person.

<sup>21</sup> Kenneth Pennington, *Innocent Until Proven Guilty: The Origins of a Legal Maxim*. Papal Justice and Due Process. Published in A Ennio Cortese, 3 Volumes. Roma: Il Cigno Galileo Galilei Edizioni (2001)

<sup>22</sup> [1996] EHRR 29

<sup>23</sup> *Id.* 45

<sup>24</sup> [1999] 3 WLR 972

<sup>25</sup> *Id.* 838, further Lord Bingham held that *sections 16A and 16B of the Prevention of Terrorism Act (Temporary Provisions) 1989* which places the burden on the accused, blatantly undermines the principle of the presumption of innocence under *Article 6(2) of the Convention*.



## 2.2 The Presumption of Innocence an Effective Safeguard under Ordinary Laws

As aforementioned, the presumption of innocence is an effective safeguard offered to suspects, which ensures the observance of due process of law. This is well reflected under ordinary laws which provide comprehensive safeguards to an accused person throughout the criminal process.

The *Criminal Procedure Code*,<sup>26</sup> (hereinafter the 'CPC') provides effective safeguards which reflect the presumption of innocence and in particular *section 173(m) and 182A of the CPC*, which provides that the prosecution shall bear the burden of proving the accused persons guilt beyond reasonable doubt. Further *section 15 of the CPC* provides the mode of arrest,<sup>27</sup> in which case it does not matter if the arrest is actual or constructive,<sup>28</sup> so long as caution is administered<sup>29</sup> under *section 113 of the CPC*.<sup>30</sup> The significance of failure to administer a caution<sup>31</sup> or the caution not being administered in full<sup>32</sup> renders the statement inadmissible.

Another important safeguard is reflected under *section 28(1) of the CPC* which provides that a police officer who makes an arrest shall, without unnecessary delay and subject to the provisions relating to bail or previous release take or send the person arrested before a magistrate's court, which is supported under *Article 5(4) of*

---

<sup>26</sup> (Act 593 Rev. 1999)

<sup>27</sup> According to subsection (1), where in making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested unless there is a submission to the custody by word or action.

<sup>28</sup> In *Jayaraman & Ors v PP* [1982] 2 M.L.J. 306, the Federal Court held that there should be an actual arrest. However in the following cases of *Kang Ho Soh* [1992] 1 M.L.J. 360 and *Shee Chin Woh* [1998] 5 M.L.J. 429, both Shankar J and Suriyadi J agree that the distinction between actual and constructive arrest is not much helpful.

<sup>29</sup> Mimi Kamariah Majid, *Criminal Procedure in Malaysia* (Third ed, 1999) University of Malaya Press, at p. 67

<sup>30</sup> According to subsection (1) (a) (ii) where in the case of a statement made by the person after his arrest, unless the court is satisfied that a caution was administered to him in the following words or words to the like effect: "It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence." However in *Chan Kim Choi v PP* [1989] 1 M.L.J. 404 it was held that if an arrest is not made and subsequently a statement is tendered, then it does not warrant a caution under the aforesaid *section 113* but a warning under *section 112 of the CPC* suffice.

<sup>31</sup> See *Krishnan v PP* [1987] 1 M.L.J. 292



the *Federal Constitution*.<sup>33</sup> Therefore, any detention after the first twenty-four hours may only be ordered by the magistrate pursuant to *section 117 of the CPC*.<sup>34</sup> This is reflected in *Hashim bin Saud v Yahya & Anor*,<sup>35</sup> where Harun J stated that the purpose of a detention under *section 117* was subject to judicial control and that the power to detain rests firmly on the magistrate not the police.<sup>36</sup> Thus, the presumption of innocence under ordinary laws is well preserved under the *CPC*, which effectively regulates the conduct of the police in the course of their investigation.

## 2.3 The Presumption of Innocence in Malaysia

In Malaysia, the presumption of innocence is reflected under *Article 5 (1) of the Federal Constitution*, which guarantees that:

‘No person shall be deprived of his life or personal liberty save in accordance with law’.

However, in the instance one cannot expressly connote the words ‘innocent’ or ‘guilty’ under the aforesaid *Article 5(1) of the Federal Constitution*.<sup>37</sup> Question then is, if the *Federal Constitution* guarantees that an accused person is innocent until proven guilty in a court of law, shouldn’t such words be expressly provided? If otherwise, how did the phrase ‘innocent until proven guilty’ find its way in the Malaysian legal jurisprudence?

<sup>32</sup> *Salleh bin Saad v PP* [1983] 2 M.L.J. 164

<sup>33</sup> *Article 5 (4)* provides that ‘where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate’s authority.’

<sup>34</sup> *Re The Detention of R. Sivarasa and Ors* [1996] 3.M.L.J. 611

<sup>35</sup> [1977] 1 M.L.J. 259

<sup>36</sup> *Id.* 262

<sup>37</sup> See *UDHR 1984* and the *Convention*, which expressly provides therein.

In order to answer in the affirmative, an apt reading of *Article 5(1) of the Federal Constitution* is required and thus, would connote that constitutionally one cannot be executed, imprisoned or fined without proper course of justice taking place. Due process itself is not defined in the *Federal Constitution*, but it is universally accepted as what we term as a ‘fair trial’<sup>38</sup> and fair trial requires the thought that the prosecution is required to prove the defendant’s guilt beyond reasonable doubt.

Further the Privy Council in *Ong Ah Chuan v PP*<sup>39</sup> which has been followed in *Kekatong Sdn Bhd v Danaharta Urns Sdn Bhd*<sup>40</sup> states that reference to ‘law’ in such context as ‘in accordance with the law’ under *the Federal Constitution*, refer to a system of law, which incorporates fundamental rules of natural justice; a common law feature of England and Wales. Lord Diplock in examining the fundamental rules of natural justice held to include the presumption of innocence. Thus, in criminal law, a person should not be punished for an offence unless it has been established to the satisfaction of an independent and unbiased tribunal that he committed it.<sup>41</sup>

Further the Federal Court in *Arulpragasam a/l Sandaraju*<sup>42</sup> applied the momentous decision of *Woolmington v DPP*<sup>43</sup> and held that:

*‘Thus it is wrong ... to whittle down the cardinal principle of our criminal law on the presumption of innocence of the accused throughout the whole trial ...’*

---

<sup>38</sup> Tan, Yeo & Lee’s, *Constitutional law in Malaysia & Singapore* (2<sup>nd</sup> ed). Kevin YL Tan, Thio Li-ann, Butterworths Asia (1997) at p. 529

<sup>39</sup> [1981] 1 MLJ 64, at p 71

<sup>40</sup> [2003] 3 CLJ 378, following *Che Ani Itam v Public Prosecutor* [1984] 1 MLJ 113

<sup>41</sup> See: *Haw Tua Tau v Public Prosecutor & Associated Appeals* [1981] 2 MLJ 49, where His Lordship made reference to Article 6(2) ECHR which provides that: ‘Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.’

<sup>42</sup> [1997] 1 MLJ 1 at 24

<sup>43</sup> [1935] AC 462



In fact consensuses apply that the whole of the Malaysian criminal jurisprudence is based on the presumption of innocence.<sup>44</sup> This position is reflected in *Khoon Chye Hin v Public Prosecutor*<sup>45</sup> where Thompson CJ quotes Holroyd J that:

*'it is a maxim in English law that it is better that ten guilty men should escape than that one innocent man should suffer.'*

Therefore in light of the above discussed, by virtue of our *Article 5 of the Federal Constitution*, which to a certain extent reflects the one recommended by the Reid Commission,<sup>46</sup> and by virtue of the common law recognition of England and Wales and the application thereafter in our criminal cases, this right to be presumed innocent is streamlined in our criminal justice system and thus, becoming a time-honoured principle of law in our local legal jurisprudence.<sup>47</sup>

This position is further enhanced by virtue of *section 4(4) of the Human Rights Commission Act 1999*, which stipulates that 'regard shall be had to the *Universal Declaration of Human Rights*', which would mean the observance of *Article 11 of the UDHR 1948*. The incorporation of these rights into the *Federal Constitution* is, without a shadow of doubt a reflection of the importance placed by our forefathers in building a just and fair nation in oath of the *UDHR 1948*.

---

<sup>44</sup> Jerald Gomez, Advocate and Solicitor High Court of Malaya. Rights of Accused Person—Are Safeguards Being Reduced? Paper presented at the 12<sup>th</sup> Malaysian Law Conference held in Kuala Lumpur from 10<sup>th</sup>- 12<sup>th</sup> December 2003, at p. 4

<sup>45</sup> [1961] 27 MLJ 105 at 108

<sup>46</sup> Rais Yatim, *Freedom under Executive Power in Malaysia: A Study of Executive Supremacy* (1995) Endowment Publications Kuala Lumpur. At p. 96-97

## 2.4 Presumption of Innocence in England and Wales Human Rights Act 1998, which

In England and Wales, the widely accepted legal standard in criminal trial is that the prosecution bears the burden of proving every element of the offence charged beyond reasonable doubt and hence, under English criminal law a person is presumed to be innocent until otherwise proven guilty. The House of Lords laid down this general rule of the presumption of innocence, which has been described as “dear to the hearts of Englishmen”<sup>48</sup> and declared to be “the undoubted law, axiomatic and elementary”<sup>49</sup> in the landmark decision of *Woolmington v DPP*<sup>50</sup> in which Sir John Smith famously commented that ‘never has the House of Lord done more noble a deed in the field of criminal law than on that day.’<sup>51</sup> Viscount Sankey LC in his famous speech in the aforesaid case held that:

*“While the prosecution must prove the guilt of the prisoner, there is no... burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt.. Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners guilt...and no attempt to whittle it down can be entertained”*<sup>52</sup>

---

<sup>47</sup> Amer Hamzah bin Arshad, Rights of Accused Person: Are Safeguards Being Reduced? Infoline, Human Writes Issue 7 Jan/Feb 2004, at p. 2

<sup>48</sup> Williams, Proof of Guilt, 151  
(<http://www.historycooperative.org/journals/1hr/23.1/smith.html>)

<sup>49</sup> *Coffin v United States*, 156 U.S. 432, 453 [1895]

<sup>50</sup> [1935] AC 462

<sup>51</sup> Smith, “The presumption of innocence” [1987] 38 NILQ 223, at 224

<sup>52</sup> *Id* 481



This principle is now affirmed in the *Human Rights Act 1998*, which incorporates *Article 6(2) Convention* into English domestic law.<sup>53</sup> The European Court of Human Rights in *Allenet de Ribermont v France*<sup>54</sup> held that the presumption of innocence in *Article 6(2)* is one of the elements necessary to ensure fair trial and stated the following:

*“The presumption of innocence...will be violated if a judicial decision concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding that there is some reasoning suggesting that the court regard the accused as guilty... Moreover, the Court reiterates that the Convention must be interpreted in such a way as to guarantee rights which are practical and effective as opposed to theoretical and illusory”.*<sup>55</sup>

## 2.5 Presumption of Innocence under Selected Jurisdiction

In Canada, *section 11(d) of the Canadian Charter of Rights and Freedoms* reads that “any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”. In France, *Article 9 of the Declaration of the Rights of Man and of the Citizen*, of constitutional value, reads that “every man is supposed innocent until having been declared guilty.”

<sup>53</sup> John Wadham & Helen Mountfield, *Blackstone's Guide To The Human Rights Act 1998* (2<sup>nd</sup> ed 2000)

<sup>54</sup> [1995] 20 EHRR 557. The Court of Human Rights held that this declaration of the applicant's guilt had firstly encouraged the public to regard him as guilty and, secondly, prejudiced the assessment of the facts by the judicial authority.

<sup>55</sup> *Id.* 33-35

The United States of America's Constitution has certain similarities with our *Article 5 of the Federal Constitution*. In which, although the presumption is not expressly reflected in the former Constitution, nevertheless, it is widely held to stem from the Fifth Amendment, which reads that '*no person shall be deprived of life, liberty, or property without due process of law.*'<sup>56</sup> Therefore it is evident that the presumption of innocence operates in the most recognisable of legal systems and hence accorded due recognition.

## 2.6 Conclusion

It is reiterated that the presumption of innocence is reflected throughout the criminal process and its application is of universal in nature. Thus, failure to adhere to the presumption may lead to potential miscarriage of justice and as Packer contends, the presumption of innocence means that, until there has been an adjudication of guilt by an authority legally competent to make such an adjudication, the suspect is to be treated, for reasons that have nothing whatever to do with the probable outcome of the case, as if his guilt is an open question.<sup>57</sup>

<sup>56</sup> See *Coffin v United States* 156 U.S. 432, 453 [1895]

<sup>57</sup> Herbert L. Packer, Loc. cit.



## PRESUMPTION OF INNOCENCE AND TERRORISM LAWS

### 3.0 Introduction

As aforementioned, the presumption of innocence is said to operate in two distinct contexts of the criminal process; firstly, in regards to the treatment of suspects or accused before and during trial and secondly, referring to the standard of proof in criminal cases.<sup>58</sup> For our present discussion, the application of this universal doctrine is confined to the first context, which is the pre-trial criminal stage. The pivotal discussion would be in light of preventive detention, and the ensuing denial of the right to counsel thereafter, which, obliterates this majestic right of innocence and proliferates manifest injustice in the criminal justice system, which has somewhat become undesirable and no longer seems to serve its purpose of reducing crime and deliver justice.<sup>59</sup>

It would be demonstrated that those arrested under such anti-terrorism laws have been found guilty at the very outset, coupled with the over sensationalising of such arrest in the media with centre fold headlines like ‘terror plot foiled’ and ‘catastrophe averted’, add to this perversion. Such statements impute guilt at the very outset and promote fear in the Community even before an unlikely trial.<sup>60</sup>

Governments in dealing with threats of terrorism fail to observe fundamental rights when enacting terrorism laws, and this is apparent especially when such laws provide ineffectual safeguards, which leave room for potential abuse of power by the Executive. Such propositions taken by the Government reflect that the law is not

<sup>58</sup> See Chapter 2: Presumption of Innocence

<sup>59</sup> Professor Wu Min Aun, Human Rights and Law Enforcement. Keynote Address at Conference on Human Rights and the Administrative of Law Kuala Lumpur 9-10 Sept 2003. at p 1-2 (<http://www.cdu.edu.au/law/staff/wu/wu2.htm>)

<sup>60</sup> Sarah Stephen, Muslim denied presumption of innocence. Green left Weekly, November 16, 2005. This is evident especially under *ISA 1960* which does not envisage a trial in a court of law.

taken seriously.<sup>61</sup> It is contended that such anti-terrorism measures remarkably change the very basic identity of the criminal justice system in that basic principles underlying detention and the right to counsel would be curtailed extensively.

Adding to this state of predicament<sup>62</sup> is the express insecurity in relation to the diverse definition of terrorism that has ascended along the century. The reason for such diversity in the absence of any one single accepted definition of terrorism as Dr. Abdul Haseeb describes is due to its polymorphous term; its meaning changes with the change of situations in which terrorist acts are committed, one man's terrorist is another man's freedom fighter.<sup>63</sup>

In fact it should be pointed out that even the Islamic criminal law does not provide any definition of terrorism as neither the Quran, nor the Hadith literature specifically indicates the crime of terrorism.<sup>64</sup> However, to some length a definition of terrorism can be made out in the Islamic jurisprudence as the use of violence by Muslims or non-Muslims organisations for political purpose against any legal and legitimate state. Thus, the key factor therefore is violence.<sup>65</sup>

This proposition that it may be impossible to have one single definition of terrorism is supported by both reigning and incumbent Premier's of Malaysia. Ironically, both Datuk Seri Abdullah Ahmad Badawi and Tun Datuk Seri Dr Mahathir Mohamad seem to define terrorism in a very broad manner. Our reigning Premier

---

<sup>61</sup> Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977), at 205

<sup>62</sup> Further, it is regretted that the liberty of an accused person is left at the hands of the Executive rather than the Judiciary especially when the nature of the alleged offence is one which is regarded to be so serious that judicial intervention is highly necessary.

<sup>63</sup> The learned author describes that although terrorist acts are as old as man, nevertheless the word 'terrorism' is of recent and it is concurred to be an all encompassing word. In which until recent a whole new dimension has been added to its definition as being a threat to international peace and security pursuant to the United Nations Security Council, Resolution 1373. Dr. Abdul Haseeb Ansari, *Terrorism, National Integrity and Human Rights: A Critical Appraisal*, (2002) 3 MLJ at pp ccv-ccvi.

<sup>64</sup> Dr. Mohammad Shabbir, *Outlines of Criminal Law and Justice in Islam*, International Law Book Services, at p. 208

<sup>65</sup> *Ibid*, this may range to the use of chemicals/explosives, kidnapping to destruction of property



reasons that terrorism includes among others, groups intending to overthrow governments through extra constitutional means or introduce a new system of governance through militant attacks.<sup>66</sup> Whereas our incumbent Premier even suggested that armed or other forms of attacks against civilians should be considered as terrorism.<sup>67</sup>

With due respect, it is humbly submitted that both the aforesaid definitions are at extreme ends. Such broad definitions could lead to manifest miscarriage of justice and although it was cited by the incumbent Premier that the United Nations would seem to be the only appropriate body competent enough to call for a unified definition of terrorism,<sup>68</sup> nevertheless in light of the stigma attached, in which terrorism is regarded as the greatest enemy of humankind today,<sup>69</sup> such perilous attempts may lead to potential erosion of the presumption of innocence.

### 3.1 Terrorism Defined

Although nations have united in one voice to fight terrorism, which is regarded as a global threat, what has left divided is the need for a single and comprehensive definition of terrorism. In most cases it is opined that the reason for such vague and undesirable culminations of definitions is a result of rather a knee jerk reaction than a thoughtful and detailed analysis required of the aforesaid.

Both the Malaysian and British parliament had passed various terrorism laws that define terrorism in a very broad manner leaving potential abuse of power by the executive which in turn may disregard fundamental principles of law especially in regards to presumption of innocence.

<sup>66</sup> Have A Common Understanding of Threats of Terrorism, Asean Told, Kuala Lumpur, May 20 (Bernama)

<sup>67</sup> Dr. Mahathir Calls for Global Definition, Action Against Terrorism, Kuala Lumpur, April 1 (Bernama) Ministry of Foreign Affairs Malaysia

<sup>68</sup> *Ibid*

<sup>69</sup> *Ibid*

### 3.1.1 Definition of Terrorism in Malaysia

Although there are profusion of laws that exist in Malaysia in relation to terrorism related offences, the insertion of the new *Chapter VIA* “Offences relating to Terrorism” to the *Penal Code (Amendment) Act 2003 (Act A1210)* is an attempt by the Government on a global mission to fight terrorism without realising that Malaysia can cope and fight terrorism with existing laws especially under the *ISA 1960*.<sup>70</sup>

The following amendments were made to the *Penal Code* defining ‘terrorist’ to mean any person who commits, or attempts to commit any terrorist act; or participates in or facilitates the commission of any terrorist act.<sup>71</sup> Pursuant to *section 130B* ‘terrorist act’ seem to embrace all types of situation which may not even be regarded to fall under such act. *Section 130B* provides:

- (2) For the purpose of this Chapter, ‘terrorist act’ means an act or threat of action within or beyond Malaysia that:
  - (a) involves serious bodily injury to a person;
  - (b) involves serious damage to property;
  - (c) endangers a person’s life;
  - (d) creates a serious risk to the health or the safety of the public or a section of the public;
  - (e) involves the use of firearms, explosive or other lethal devices;
  - (f) involves releasing into the environment or any part of the environment or distributing or exposing the public or any part of the public to-
    - (i) any dangerous, hazardous, radioactive or harmful substance;
    - (ii) any toxic chemical; or
    - (iii) any microbial or other biological agent or toxin

<sup>70</sup> For further reading see Chapter 4: Terrorism Laws in Malaysia

<sup>71</sup> Section 130B (1) (a) & (b)



- (g) is designed or intended to disrupt or seriously interfere with, any computer system or the provision of any services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;
- (h) is designed or intended to disrupt, or seriously interfere with, the provision of essential emergency services as police, civil defence or medical services;
- (i) involves prejudice to national security or public safety; or
- (j) involves any combination of any of the acts specified in paragraphs (a) to (i), where the act of threat is intended or may reasonably be regarded as being intended to-
  - (aa) intimidate the public or a section of the public; or
  - (bb) influence or compel the Government of Malaysia or the Government of any State in Malaysia, any other Government, or any international organisation to do or refrain from doing any act, and includes any act or omission constituting an offence under the *Aviation Offences Act 1984* (Act 307)

### 3.1.2 Definition of Terrorism in England and Wales

In England and Wales, the *ATCSA 2001* which is regarded as a product of post September 11, 2001 attacks in New York defines ‘terrorist’ as a person who is or has been concerned in acts of ‘international terrorism’ or belongs or has links to an international terrorist group<sup>72</sup> and ‘terrorism’ has the meaning set out in *section 1 of the Terrorism Act 2000* in the following:

(1) In this Act ‘terrorism’ means the use or threat of action where-

- (a) the action falls within subsection (2)

<sup>72</sup> Part 4 of the *ATCSA 2001*

purpose (b) the use of threat is designed to influence the government or intimidate the public or a section of the public, and

(2) Action falls within the subsection if it-

- (a) involves serious violence against a person
- (b) involves serious damage to property
- (c) endangers a person's life, other than that of the person committing the action
- (d) creates a serious risk to the health or safety of the public or a section of the public, or
- (e) is designed seriously to interfere with or seriously disrupt an electronic system

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosive is terrorism whether or not subsection (1) (b) is satisfied

(4) In this section-

- (a) 'action' includes outside the United Kingdom
- (b) a reference to any person or to property is a reference to any person, or to property, wherever suited
- (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
- (d) 'the government' means the government of the united Kingdom, of a part of the United Kingdom or of a country other than the United Kingdom

(5) in this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organization

The *PTA 2005* defines 'terrorism' as the use or threat of action designed to influence the government or to intimidate the public or a section of the public with the



purpose of advancing a political, religious or ideological cause. In regards to terrorism related activity, these include the commission, preparation, or instigation of acts of terrorism, facilitating or encouraging such acts. It is immaterial whether the acts of terrorism in question are specified acts of terrorism or acts of terrorism generally.

It is clear that each of the relevant provisions under the *Terrorism Act 2000*, *ATCSA 2001* and the *PTA 2005* attempt to define terrorism and terrorism acts in a very broad manner without any consistency of resemblance to each other and seem to disparage the very requisite elements of crime in which both the act and requisite intent must be present in order for there to be a crime. This is evident especially in regards to the apathetic usage of words like where the act or threat is intended or may reasonably be regarded as being intended to, is ambiguous and vague.<sup>73</sup> It would be hardly impossible to establish intention without the admission of evidential issues in the aforesaid context especially when such offences are instantaneously regarded as matters of national security and hence, explicitly tying the hands of the judiciary.

### 3.2 Conclusion

It is worrying that detention without trial under anti-terrorism laws has gained tremendous support in the aftermath of the 9/11 attacks on the World Trade Centre and Pentagon and the culminating terror attacks in Madrid, London and in Bali. This suggest that the world has joined forces to counter future terrorist attacks by implementing various terrorism laws which clearly infringe basic rights accorded to an accused person, especially the right to be presumed innocence. In fact the solidarity and justification for such laws expressed by world leaders has given our very own *ISA 1960* a new lease of life for its existence and continued justification. For

whatever validation it may attach, one thing is certain, that such laws are as much greater danger to ordinary citizens than to terrorist.<sup>74</sup>

It would also seem appropriate to mention that although it was never a forum for such discussion in this paper, that inevitably, terrorism laws have triggered social unrest among certain religious quarters that seem to be the obvious targets under such laws. As the case may be, although not many have been charged with a crime linked to acts of terrorism but it is certain that many had been stripped of their fundamental rights in the process.

The potential miscarriage of justice that may occur from such laws are when an accused is held in detention without charge, without access to an advocate, and in solitary confinement without any contact with family members or may even face deportation, without any hearing or given a chance to contest in a court of law. The unfortunate predicament is that enforcement authorities have justified torture of terrorist suspects in light of the severity of the offence if committed. The failure to adhere to fundamental and procedural rights not only injure those who are wrongfully accused but ultimately ourselves.<sup>75</sup>

<sup>73</sup> Edmund Bon, Terrorizing the Terrorists, Paper presented at the Public Forum on 'Anti-Terrorism Laws and National Security' on 8 December 2003 jointly organized by the Bar Council, SUARAM & HAKAM. The Malaysian Bar. ([www.malaysianbar.org.com](http://www.malaysianbar.org.com))

<sup>74</sup> James R. Elwood & Jarret B. Woostein, Dictatorship at Your Doorstep. Why "Anti-Terrorism" Laws Threaten You. (May 2002) (<http://www.isil.org/resources/lit/dictatorship-at-doorstep.html#author>)

<sup>75</sup> *US v Salerno* 481 US 739 [1987], per Justice Marshall



## ANTI-TERRORISM LAWS IN MALAYSIA

## 4.0 Introduction

'So, your inquiry here is not to determine whether each accused is guilty or innocent, because innocence is not something an accused person is required to prove'.<sup>76</sup>

In Malaysia unlike in England and Wales,<sup>77</sup> pursuant to *Article 4 of the Federal Constitution*, the Constitution is regarded as the supreme law of the land and being a written constitution it personifies, amongst others, the important rules about the framework of government and pronouncements about the rights and duties of citizens and non-citizens alike.<sup>78</sup>

This fortified concept of the supremacy of the *Federal Constitution* is echoed in the judgment of Raja Azlan Shah FJ (as he then was) in *Loh Kooi Choon v Government of Malaysia*,<sup>79</sup> where his lordship held, that among others, the fundamental concept of the rule of law is an entrenched concept within the *Federal Constitution* and which is reflected in *Articles 5-13 of Part II of the Federal Constitution*. The ultimate aim of the rule of law is to secure and guard individual rights against any exercise of arbitrary powers by the State.<sup>80</sup>

<sup>76</sup> Ian Barker QC to the jury at the commencement of the trial in 1982. Extract taken from: *Innocence Regained the Fight to Free*. Lindy Chamberlain, Norman H. Young. The Federation Press 1989

<sup>77</sup> In England and Wales the Constitution is unwritten, however it has inter alia, certain set of laws, customs and conventions that is adhered to.

<sup>78</sup> Amer Hamzah bin Arshad, *Rights of Accused Persons: Are Safeguards Being Reduced?* Infoline Human Writes. Issue 7 Jan/Feb 2004.

<sup>79</sup> [1977] 2 MLJ 188

<sup>80</sup> His lordship held, apart from recognising the concept of the rule of law that embodies the *Federal Constitution*, the other two concepts include, the distribution of sovereign power between the States and the Federation, and the concept of separation of powers among the Executive, Legislative and Judicial branches of government, compendiously expressed in modern terms that we are a government of laws, not of men.

This notion of the rule of law is further enhanced with the principle of natural justice<sup>81</sup> to which both these principles form the nucleus of an ideal criminal justice system.<sup>82</sup> However, the paramount consideration of any criminal justice system apart from observing *Article 5(1) of the Federal Constitution* is the conformity to the right to a fair trial, which represents a manifestation of a bundle of basic and fundamental rights accorded to the accused person. These fundamental rights are preserved under the *Federal Constitution* expressly providing for certain available rights to the accused person at both pre-trial<sup>83</sup> and trial stages, which includes the point in discussion, the right to be presumed innocent in pre-trial stage.

Though it may seem at first hand that the accused person is well protected under the *Federal Constitution*, nevertheless, upon detail examination of what is regarded as the armour of all safeguards accorded to an accused person only seem the opposite when in direct conflict with the provisions of anti-terrorism laws, which is inadvertently attributed to the surrounding circumstances leading to the birth of the *Federal Constitution* itself.

<sup>81</sup> The court in *Kanda v Government of the Federation of Malaya* [1962] MLJ 169 held that the principle of natural justice embodies two essential rights which is the right to be heard and the rule against biasness and these rights are entrenched in *Articles 5(1) and 8(1) of the Federal Constitution*.

<sup>82</sup> *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64

<sup>83</sup> The right of accused persons to be informed of the grounds of arrest under *Article 5(3) of the Federal Constitution*, and the right to production before a Magistrate under *Article 5(4) of the Federal Constitution*.



#### 4.1 Anti-Terrorism Laws

The state of affairs clouding over Malaya during the preceding and post independence has to some extent influenced the shape of the constitutional character of the *Federal Constitution*<sup>84</sup> with the insertion of *Article 149*. The significance of *Article 149 of the Federal Constitution* is that it allows the Government to enact legislations which may potentially affect customary constitutional rights that are reflected within the Constitutional text itself.<sup>85</sup>

One such law that was enacted by the Government was the *ISA 1960* in which former Chief Justice of Malaysia Tun Mohamed Dzaiddin Abdullah describes as a special piece of legislation that has its provenance in *Article 149 of the Federal Constitution 1957*.<sup>86</sup> Thus, the *ISA 1960* as iterated by former Prime Minister Dr. Mahathir is the central arsenal of the Executive to curb terrorism in Malaysia.<sup>87</sup>

Apart from the *ISA 1960* and *Article 149*,<sup>88</sup> the following laws below would demonstrate the extent in which these laws curtail fundamental liberties enshrined in the *Federal Constitution*:

1. *Article 150 FC: Proclamation of Emergency*<sup>89</sup>
2. *Chapter VI 'Offences Against the State' of the Penal Code (Act 593)*<sup>90</sup>
3. *Penal Code (Amendment ) Act 2003 (Act A1210)*<sup>91</sup>

<sup>84</sup> A cloud of political uncertainty and struggle hovered over Malaya during the insurgency of the Communist from 1948 to 1960 to which the British issued an emergency proclamation in 1948. This continued through independence and ended only in 1960. Extract taken from: Ramdas Tikamdas, National Security and Constitutional Rights-The Internal Security Act 1960. ([www.malaysianbar.org.my](http://www.malaysianbar.org.my))

<sup>85</sup> *ibid*

<sup>86</sup> Mohamed Dzaiddin Abdullah, National Security Considerations under the Internal Security Act 1960-Recent Developments, First presented at a conference on "Constitutionalism, Human Rights and Good Governance" at Kuala Lumpur on 30 Sept to 1 Oct 2003, at p 1

<sup>87</sup> Malaysia's Internal Security Act and Suppression of Political Dissent, A Human Rights Watch Backgrounder, Human Rights Watch (<http://hrw.org/backgrounder/asia/malaysia-bck-0513.htm>)

<sup>88</sup> Provides for legislation against subversion, action prejudicial to public order

<sup>89</sup> The following laws are yet to be revoked:

- i) *Emergency (Essential Powers) Ordinance 1969*
- ii) *Essential (Security Cases) Regulations 1975 (ESCAR)*
- iii) *Emergency (Essential Powers) Act 1979*

<sup>90</sup> *Chapter VI* in general provides a list of offences committed against the Yang di Pertuan Agong or the Ruler or Yang di Pertua Negeri. One notable section is *Section 121* which provides; Waging or attempting to wage war, or abetting the waging of war.

<sup>91</sup> The *Penal Code (Amendment) Act 2003 (Act A1210)* was passed in 2003, in which, it received Royal Assent on 17 December 2003 and thereafter published in the Gazette on 25 December the same year. Aliran, Amendments to the Criminal Procedure Code: Aliran's representation to the Parliamentary Select Committee. Aliran Monthly Vol. 24 (2004): Issue 10.



#### 4. *Essential (Security Cases) (Amendment) Regulation 1975* (P.U.(A) 362)

The aforesaid bundles of laws apart from the *ISA 1960* are well equipped to deal with terrorism related offences. In the Grik incident, the prosecution successfully relied on *section 121 of the Penal Code* in the prosecution of Al-Ma'unah group to which the trial judge concurred that the offence amounted to an act of terrorism.<sup>92</sup> Consequently such laws have made tremendous inroads to our fundamental liberties especially in regards to the presumption of innocence.

#### 4.2 The Presumption of Innocence under the *ISA 1960*

The *ISA 1960* was enacted to serve and wipe out the insurgency of the communist guerrilla threat and although it no longer serves its true purpose<sup>93</sup> it remains a permanent and forceful feature in our democratic society and hence, it has been used over the years for various reasons culminating from ethnic riots in 1969, political and religious activities throughout the early 1960's to late 1990's, identity paper forgery, smuggling of illegal migrant workers, to suppress peaceful political, academic and social activities, legitimate constructive criticism by NGOs and other social pressure groups<sup>94</sup> and now as a global issue to eliminate terrorism.<sup>95</sup>

What makes the *ISA 1960* so potently dangerous in its application is that it gives the Executive absolute power to deprive a person of his or her liberty

---

(<http://www.aliran.com/oldsite/monthly/2004b/10h.html>)

<sup>92</sup> Edmond Bon, *Terrorizing the Terrorist*, Paper presented at the Public Forum on 'Anti Terrorism Laws and National Security' on 8<sup>th</sup> December 2003. Jointly organized by the Bar Council, SUARAM & HAKAM (<http://www.malaysianbar.org.my>)

<sup>93</sup> The credibility of the *ISA 1960* was lost when the Communist Party of Malaya signed a formal peace treaty in Thailand in 1989.

<sup>94</sup> For comprehensive reading, see: Amnesty International Report Malaysia, *Human Rights Undermined: Restrictive Laws in a Parliamentary Democracy*. 1 Sept 1999. At pp. 6-12. (<file:///A:/Abolish ISA Movement.htm>)

<sup>95</sup> The use of *ISA 1960* was justified as the government recognized potential threat emanating from Islamist extremist namely the KMM, Jemaah Islamiyah and the Madrasah Lugmanul Hakiem founded by Abu Bakar Bashir operating in Malaysia. Human Rights Watch Publication



indefinitely without trial solely for preventive reasons which goes against the very fundamental principles of law including the presumption of innocence.<sup>96</sup> The *ISA 1960* had completely removed any recourse for judicial review, which were the only safeguards designed to protect abuse from any exercise of power by the Executive. In 1989 a series of amendments were intensified signalling a 'hands off' intent by the Executive to the Judiciary with the insertion of *section 8B of the ISA 1960* which provides an ouster clause that reads: (1) There shall be no judicial review in any court of law, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.<sup>97</sup>

The ensuing discussion is therefore confined relatively to only detention orders under *section 8* and 60 day interrogation period under *section 73 (1) of the ISA 1960* and the denial of the right to counsel therein, which clearly violates the accused right of innocence. It therefore warrants the author to reside in full the aforesaid draconian provisions under the said Act below to highlight the potential abuse of powers by the relevant authorities.<sup>98</sup>

#### 4.2.1 Section 73 of the ISA 1960

*Section 73* deals with Police Power of Arrest and Detention which provides:

(1) that any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe

<sup>96</sup> Other rights include the right to liberty of the person, freedom from arbitrary arrest, the right to be informed of the reasons for arrest and the right to a fair and open trial.

<sup>97</sup> Further the *ISA 1960* fails to provide any specific determination as to what activities may or may not amount to threat to security or the maintenance of essential services and as such, determination is within the sole subjective discretion of the Minister concern which may lead to potential abuse of powers therein.

<sup>98</sup> By both the Executive and the enforcement agency i.e. the police authority

(a) that there are grounds which would justify his detention under section 8; and

(b) that he has acted or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or the economic life thereof.

(2) Any officer may without warrant arrest and detain pending enquiries any person, who upon being questioned by the officer fails to satisfy the officer as to his identity or as to the purposes for which he is in the place where he is found, and who the officer suspects has acted or is about to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

(3) Any person arrested under this section may be detained for a period not exceeding sixty days without any order of detention having been made in respect of him under section 8:

Provided that-

- (a) he shall not be detained for more than twenty four hours except with the authority of a police officer of or above the rank of Inspector;
- (b) he shall not be detained for more than forty eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and
- (c) he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector General or to a police officer designated by the Inspector General in that behalf, who shall forthwith report the same to the Minister



#### 4.2.2 Section 8 of the ISA 1960

Section 8 deals with Ministerial Order of Detention which provides:

(1) if the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services<sup>99</sup> therein or the economic life thereof, he may make an order (hereinafter referred to as “a detention order”) directing that the person be detained for any period not exceeding two years.

(7) The Minister may direct that the duration of any detention order or restriction order be extended for such further period, not exceeding two years, as he may specify, and thereafter for such further periods, not exceeding two years at a time, as he may specify, either-

- (a) on the same grounds as those on which the order was originally made;
- (b) on grounds different from those on which the order was originally made; or
- (c) partly on the same grounds and partly on different grounds:

Provided that if the detention order is extended on different grounds or partly on different grounds the person to whom it relates shall have the same rights under section 11 as if the order extended as aforesaid was a fresh order, and section 12 shall apply accordingly.

In the case of *Theresa Lim Chie Chin & Ors v Inspector General of Police*,<sup>100</sup> the Appellants were arrested under section 73 and appealed to the Supreme Court<sup>101</sup> on grounds amongst other, that the police powers under section 73 is

<sup>99</sup> Section 2 of the ISA 1960.

<sup>100</sup> [1985] 1 MLJ 143.

<sup>101</sup> See before the case of *Karupiah Marican & Ors v Noorulhaq bin Nazeem* (2005) 1 CLJ 345, 346 (2005) 1 MLJ 1793. One of the earlier Federal Court cases that applied the subjective test was the case of *Re Inspector-General of Police v Tan Sri Raja Khalid bin Raja Harun* (1983) 1 MLJ 122, which was later reversed and expanded in the case of *Theresa Lim Chie Chin & Ors v Inspector General of Police* (1985) 1 MLJ 143.

<sup>99</sup> Subsection 2 defines essential services to mean any services, business, trade, undertaking, manufacture or occupation included in the Third Schedule.

### 4.3 The Application of the Presumption under Sections 8 and 73 of the ISA 1960

The *ISA 1960* empowers the government to detain any person without any recourse for judicial review<sup>100</sup> for a period not exceeding two years and to which it may be renewed indefinitely and the police without any warrant of arrest in the course of their investigation for a period of up to 60 days. This therefore is a clear violation of fundamental rights effecting the presumption of innocence enshrined in the *Federal Constitution* pursuant to *Article 5*.

Although the reviewability of police detention under *section 73* was made possible in the Federal Court's landmark decision in *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals*<sup>101</sup> the same however cannot be said of the Ministerial Order of Detention under *section 8*.<sup>102</sup> But before embarking on the latter, it warrants foremost to discuss the relevant cases leading to the monumental decision by the Federal Court in *Mohamad Ezam* in relation to police detention under *section 73*.

Prior to the landmark decision in *Mohamad Ezam*, there were many controversial cases under *section 73* in which the courts favoured a subjective test for judicial review which placed the burden on the detainee to show that the power exercised was mala fide or made for collateral or ulterior purpose.

In the case of *Theresa Lim Chin Chin & Ors v Inspector General of Police*,<sup>103</sup> the Appellants were arrested under *section 73* and appealed to the Supreme Court<sup>104</sup> on grounds amongst other, that the police powers under *section 73* is

---

<sup>100</sup> *Section 8 of the ISA 1960*

<sup>101</sup> [2002] 4 MLJ 449

<sup>102</sup> See below the case of *Kerajaan Malaysia & Ors v Nasharuddin bin Nasir* [2003] 1 CLJ 345, 348

<sup>103</sup> [1988] 1 MLJ 293. One of the earlier Federal Court cases that applied the subjective test was the case of *Re Inspector-General of Police v Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182, which was later restated and expanded in the case of *Theresa Lim Chin Chin & Ors v Inspector General of Police* [1988] 1 MLJ 293

<sup>104</sup> The High Court rejected their application for habeas corpus for their release on the ground that the arrest was illegal.



judicially reviewable and therefore the correct test is one which is objective. The Supreme Court once again by dismissing the appeal rejected this argument and espoused a broad approach in the interpretation of the scheme of legislation both under the *Federal Constitution* and the *ISA 1960*.

The Supreme Court held that the police power to arrest and detain pending enquiry pursuant to *section 73* is not to be regarded as an independent scheme of detention under the *ISA 1960* but rather the initial stage in the scheme leading to the preventive detention under *section 8*. This, coupled with the argument that *Article 151 (3) of the Federal Constitution*, provides that the authority<sup>105</sup> need not disclose facts where disclosure would in its opinion, be against the national interest pursuant to *section 16 of the ISA 1960*.<sup>106</sup> Therefore since *sections 73* and *section 8* were held to be one scheme of preventive detention, the right of non-disclosure under the aforesaid *Article 151* was conferred on both the Minister as well as the police.

This decision clearly reflects the potency of the *ISA 1960* which hinders the court from assessing the fairness of detention pending inquiry pursuant to *section 73* and *section 8* order as any evidence obtained in the course of investigation is not subject for disclosure when national security reasons are invoked. This is made pursuant to *Article 151 (3)* and *section 16* which allows the police and the Executive to withhold any information on grounds of national interest and the court is only limited to information that is presented voluntarily before it and nothing more.<sup>107</sup> The significance of this decision is that it ties the hands of the judiciary but most

<sup>105</sup> "Authority" here would include all those with powers dealing with preventive detention

<sup>106</sup> The Supreme Court supported the proposition that evidence and information relating to arrest and detentions, either at the initial stage or in pursuant to the Ministerial order is excluded from public disclosure pursuant to *section 16 of the ISA 1960* and under *Article 151 (3) of the Federal Constitution*

<sup>107</sup> *Ibid*



importantly, it takes away the presumption of innocence, a fundamental safeguard accorded to an accused person.

However the paradigm in relation to powers under *section 73* shifted in the case of *Mohamad Ezam*.<sup>108</sup> Here, the Federal Court in hearing an appeal for an application against the earlier decision of the High Court in refusing to grant the writ of habeas corpus for the applicants release<sup>109</sup> considered several grounds of appeal put forth by counsels contesting the legality of the said arrest and detention.

The thrust of the appellants' contention was that the exercise of the powers of detention by the respondent under *section 73* was mala fide and improper because from the evidence and circumstances of the case, their arrest and detention were not for the dominant purpose of the aforesaid *section*, that is, to enable the police to conduct further investigation regarding the appellants' acts and conduct which were prejudicial to the security of Malaysia, but merely for intelligence gathering which was unconnected with national security.

The Federal Court allowed the appeal on the basis, inter alia, that the detention was mala fide as it was made with an ulterior or collateral purpose unconnected with national security issue.<sup>110</sup> The Federal Court therefore considered the reviewability of police powers under *section 73* especially in regards to the subjective test laid down in the earlier cases highlighted above.<sup>111</sup> The Federal Court clearly disagreed with its predecessor's<sup>112</sup> and held that both *sections 73 and 8* are independent of each other as

---

<sup>108</sup> The appellants were all arrested and detained on 10 and 11 Apr 01 under *section 73 of the ISA*. The reason for the detention as stated in the respondent's affidavit was that the appellants were planning a street demonstration in Kuala Lumpur on 14 April 2001 involving some 50,000 people.

<sup>109</sup> The learned High Court judge held in dismissing their application that the appellants had been arrested and detained in the exercise of a valid power and that the appellants had failed to show that the respondent had acted mala fide in their arrest and detention.

<sup>110</sup> The Appellants were not interrogated on their alleged militant action but instead were questioned on their political activities.

<sup>111</sup> See the case of *Re Inspector-General of Police v Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182 and *Theresa Lim Chin Chin & Ors v Inspector General of Police* [1988] 1 MLJ 293

<sup>112</sup> *ibid*



the Minister can in fact detain a person pursuant to *section 8 of the ISA 1960* without even considering or relying on police investigation.

The Federal Court further observed that *Article 151 (3) of the Federal Constitution* should not be a restraining factor in determining the Court's power of judicial review on detention under *section 73(1)* on the following ground that firstly, the aforesaid *Article* relates to non-disclosure of facts upon which the detention order is based and not the grounds for detention and secondly, the aforesaid *Article 151(3)* only bars information concerning matters of national security from being disclosed to the detainee and not to the court as such.

The preferred test as concurred by the Federal Court reflects an objective test in which police powers of detention in the course of investigation under *section 73* are reviewable by the Courts. The burden is therefore, placed on the police officer to satisfy to the Court that he had reason to believe pursuant to *subsection (a) and (b) of the said section 73*. Therefore, the Court correctly held that the burden of satisfying the Court by way of material evidence, that the detainee had acted or were about to act or were likely to act in a manner prejudicial to security of the State rest on the detaining authority, in which in this case it had failed to discharge so. Although the case of *Mohamad Ezam* reflects a paradigm shift in relation to the reviewability of police detention under *section 73*, nevertheless the law in relation to judicial review of detention order made by the Minister pursuant to *section 8* still remains highly controversial.

This was addressed in *Kerajaan Malaysia & Ors v Nasharuddin bin Nasir*,<sup>113</sup> in which, the central issue on appeal was whether the Court had jurisdiction to hear

---

<sup>113</sup> [2003] 1 CLJ 345, 348



complaint against detention order issued by the Minister under *section 8*<sup>114</sup> and whether the legality or otherwise of *section 8* depends on the detention under *section 73*.<sup>115</sup>

The Federal Court on the first issue clearly held that there is no scope for judicial review of detention orders issued under *section 8* citing that the ouster clause in *section 8B* which is regarded as a constitutional provision calculatedly removes any scope for review and in regards to the second issue, it held that the legality of *section 8* detention does not depend on the legality of *section 73* detention as the relevancy of the allegations made by the police on which the detention order was based was a matter for the Minister to determine and for him alone. This therefore means that the Court's hands are tied as to any possible examination of the Minister's conclusion thereby upholding a subjective test to that effect.

This case therefore clearly illustrates that unlike the decision in *Mohamad Ezam* where judicial review is possible in light of police detention under *section 73*, the same cannot be said of detention order under *section 8* issued by the Minister. This therefore clearly curtails the right to be presumed innocent as there is no scope for review for an accused person under detention orders made pursuant to *section 8* and worst still is that the accused person is not even tried in a court of law for the alleged offence concluded by the Minister whose conclusion is not examinable.

---

<sup>114</sup> The facts of the case was conclusive as the Respondent was granted by the High Court the writ of habeas corpus for his release despite an issuance of an order for detention under *section 8*. Therefore it was argued that since custody of the Respondents were already handed over to the Minister and in view of the ouster clause under the aforesaid section, the court had no powers of review.

<sup>115</sup> The Appellants argued that the detention under *section 73* was illegal as the police rather than applying their minds on whether the detention ought to be extended or otherwise as permitted under *section 73(3)* in fact extended the detention mechanically vide the inherent powers within the scheme. As such the illegality of detention under the aforesaid section had tainted the legality of any ensuing detention order under *section 8*.



### 4.3.1 Safeguards a Reflection of the Presumption of Innocence

Although detention orders made by the Minister pursuant to *section 8* are not subject to judicial review and therefore curtails the presumption of innocence, nevertheless to some extent this presumption, which operates as a safeguard, is reflected within the scheme of the *ISA 1960*.

#### 4.3.1.1 The Advisory Board: Section 11 of the ISA 1960

Upon completion of the 60 day investigation period by the police, the Minister may then, upon, in reliance or otherwise of the material evidence gathered by the police, proceed to make a detention order pursuant to *section 8*, to which the detainee is entitled of a copy of the order.<sup>116</sup> Therefore, in the absence of an opportunity for a detainee to be heard in an open court, the Advisory Board is thus placed pursuant to *section 11 of the ISA 1960* in line with *Article 151 of the Federal Constitution*, which then allows a detainee to state his case. It seems therefore that the presumption of innocence is well reflected within the scheme of *section 11* as the advisory board provides an opportunity for a detainee to make representations as to his innocence to the Board.

However, although the Advisory Board may seem to be an effective safeguard against any potential abuse of powers made by the police and the Executive in the ensuing detention order, nevertheless the Board has its weaknesses and as such, may not reflect the proposition that it represents a reflection of the operation of the presumption of innocence.

---

<sup>116</sup> The order would enclose a statement of the grounds on which the order was made and the allegations of fact on which the order was based. Amnesty International Report Malaysia, Human Rights Undermined: Restrictive Laws in a Parliamentary Democracy, 1 September 1999. Amnesty International Report on ISA (SUARAM) (<file:///A:/Abolish ISA Movement.htm>)

This is apparent, as although the Advisory Board is a necessary instrument under *Article 151 of the Federal Constitution*, which requires that in any law sanctioning preventive detention, as in the *ISA 1960*, should contain provisions which allow the detainee to make representation to an Advisory Board, however, stipulates that the composition of the Board should be made up of three members appointed by the Yang di-Pertuan Agong, whom is advised by the Cabinet, and including a judge or retired judge.<sup>117</sup> Therefore although the Advisory Board is regarded as a substitute for an ordinary court, however, the composition of the Advisory Board does not reflect or even come close to a full bench of judges as in the ordinary court and therefore, the Board may be biased in its function as a body of review, despite the Board having in its arm only one judge or even a retired judge. This is because the majority of the Advisory Board is made up of members appointed, although by the Yang di-Pertuan Agong, nonetheless, is made upon the advice of the Cabinet, whom may have an interest and therefore indirectly may influence the outcome of any decision taken by the Advisory Board in the absence of equal judicial representation.

Further *section 12(1) of the ISA 1960*, as amended, no longer requires that the Board make a recommendation within three months of a detainee's representation, as it now, under the said amended provision allow undefined periods. It is iterated that justice should be dispensed without any delay, as is may cause hardship and anxiety on the detainee who had made the representation, but most importantly, it may result in miscarriage of justice. Even upon having made the recommendation, in which, the Board is required to review the case every six months, the Amnesty International Report on ISA, states that this practice does not often occur.<sup>118</sup>

<sup>117</sup> *Ibid*, this is reflected in *section 11 of the ISA 1960*

<sup>118</sup> *Ibid*



The Advisory Board is regarded as a toothless body of review and unlike the courts; do not have any jurisdiction to order the release of the detainee. What the Advisory Board can do within its inherent powers is only to make recommendation for the release of detainee or continued detention to the Yang di-Pertuan Agong, whom has absolute discretion and unquestionable even by the court. Further, in review of the detention order, the Advisory Board, includes in its assessment; evidence obtained in the course of police investigation and the recommendations of the police. In most cases, such evidence is obtained in the course of prolonged and aggressive interrogation, which, may amount to torture and ill treatment by the police. Amnesty International again observes that, techniques of interrogation by Special Branch police, including persuasion, deception, and coercion involving intense mental and physical pressure amounting to torture, have become entrenched methods of interrogation under the *ISA 1960*.<sup>119</sup> This was apparent in the Anwar Ibrahim trial, where evidence adduced by forensic experts suggest that there were many injuries inflicted at Anwar Ibrahim at potentially lethal places, which amounted to a blunt trauma during his detention.<sup>120</sup>

This is a clear violation of international norms prohibiting such practices on grounds that it infringes human rights standards,<sup>121</sup> especially under *Article 5 of the UDHR* which provides that, ‘no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment’.

---

<sup>119</sup> *Ibid*

<sup>120</sup> *Ibid*

<sup>121</sup> *Article 3 of the Declaration on the Protection of All Persons from Being Subject to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* states: ‘No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment’.



Such evidence obtained therefore, is inadmissible and should never be admitted in the assessment process, but then again, the Advisory Body, being a creature of the Executive, may ignore fundamental rules of evidence.

#### 4.4 Right to Counsel under the ISA 1960

The right to counsel is regarded as one of the most fundamental rights accorded to an accused person,<sup>122</sup> and as such, this right finds its place in the heart of the *Federal Constitution*.<sup>123</sup> Article 5(3) of the *Federal Constitution*, which provides, in the following reproduced:

*'Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.'*

Although without doubt the right to counsel is accorded a constitutional distinctiveness by virtue of the said Article 5 (3), however, due to its insularity of construction, the gloss of elitism accorded had been whittled down over the years as a result of courts indecisive rulings. This is evident where it has always been a constant debate between the legal counsel and the police as to when the aforesaid right truly begins? It is opined that the right to counsel should begin from the very moment the

---

<sup>122</sup> The *Constitution* of the United States provides that every accused person has the right to counsel upon arrest and unless he chooses to waive the said right it is absolute. See *Miranda v Arizona* 384 US 436 [1966] USSC

<sup>123</sup> Article 5(3) is a reinstatement of a right to counsel which existed even before the *Federal Constitution* of Malaysia in the form of s 255 of the *CPC* (F.M.S. Cap. 6) where it provides that subject to ... any express provision of law to the contrary, every person accused before any Criminal Court may of right be defended by an advocate. (Act 593 Rev. 1999) and s 250 of the *CPC* (S.S. cap. 21) now repealed by Act A908 to which these provisions had granted to every person accused the right to be defended by an advocate. This is in conformity with the decision of the High Court judge Hashim Yeop A. Sani J in *Ooi Ah Phua v Officer in Charge of Criminal Investigation, Kedah/Perlis*



accused person is arrested and as such any form of delay should not be compromised as it would be unconstitutional to do so. Any delay in the right to counsel is an encroachment of the presumption of innocence accorded to an accused person, more so, in light of the ineffective judicial safeguards apparent under the *ISA 1960*.<sup>124</sup>

This predicament arises as a result of the phrasing of *Article 5 (3) of the Federal Constitution*, in that, although it provides for a right to counsel, however it does not expressly or impliedly state when such right can be exercised. This therefore in practise makes the aforesaid right rather ineffective as a suspect can be picked up by the police without having any idea of what the charge is and because counsel has no access, the suspect cannot be advised of his legal right.

In conforming this, Federal CID Director Commissioner Datuk Fauzi Shaari explains that whether a suspect has the right to see a lawyer before investigation depends on the nature of the case and it is at the discretion of the police as they have the right to approve or object to a lawyer seeing the suspect.<sup>125</sup> Further the late Suffian LP in deciding the aforementioned held in *Ooi Ah Phua v Officer in Charge of Criminal Investigation, Kedah/Perlis*<sup>126</sup> the law as it stands today:

*"With respect I agree that the right of an arrested person to consult his lawyer begins from the moment of arrest, but I am of the opinion that that right cannot be exercised immediately after arrest."*

---

[1975] 1 MLJ 93 who held at p 89 that *Article 5(3)* of our Constitution now guarantees this right and at the same time has converted into a constitutional provision

<sup>124</sup> *Miranda v Arizona* 384 US 436 [1966] USSC, where the courts held that to whittle down such constitutional safeguard should render the detention unlawful and the whole case against the accused should be thrown out.

<sup>125</sup> StarMag, Sunday 6 March 2005

<sup>126</sup> [1975] 2 MLJ 198, The subject in this case was arrested by the police on Dec 26, 1974 and was formally charged on Jan 07, 1975 for abetment in armed robbery. The appellant, the father of the subject, instructed solicitors and counsel attempted to see the subject but was unsuccessful in their application and subsequently the appellant applied for a writ of habeas corpus alleging that (1) the right of the subject to consult and be defended by counsel of his choice commenced immediately after his arrest and (2) this right is an unqualified right and the denial of this right by the police had



With due respect, in light of the present criminal justice system, it is opined that the law as articulated by Suffian LP would be unacceptable<sup>127</sup> especially in light of the stigma attached to an accused person who is being detained for alleged terrorist activities, but most importantly is that a fundamental right of such importance enshrined in the Constitution if restricted<sup>128</sup> defeats the very fundamental norms of civil liberties.

However, this is not the case as His Lordship Salleh Abbas LP in *Theresa Lim Chin Chin* put forth the question as to when a detainee arrested under *section 73 of the ISA 1960* should be allowed to exercise his right under *Article 5(3) of the Federal Constitution* to consult a lawyer of his choice and unequivocally answered in line with the Federal Court decision in *Ooi Ah Phua v Officer in Charge, Criminal Investigations, Kedah/Perlis*. In other words, the matter should best be left to the good judgment of the authority as and when such right might not interfere with police investigation. To show breach of *Article 5(3) of the Federal Constitution*, an applicant has to show that the police had deliberately and with bad faith obstructed a detainee from exercising his right under the said *Article*.

This proposition that the said right could even be delayed in cases of *ISA* detainees is very disturbing, for all the wrong reasons that the *ISA 1960* projects, imagine what lawlessness would result if a detainee under the *ISA 1960* has been denied his right under *Article 5(3) of the Federal Constitution* and worst still it is left

---

rendered the detention unlawful. The application having been dismissed in the High Court, the appellant appealed to the Federal Court

<sup>127</sup> Rights of Accused Person-Are Safeguards Being Reduced? Jerald Gomez (2004) 1MLJ xx, (2004) 1 MLJA 20, at p 6 disagrees with his lordship's decision on the point as it cannot stand the test of logic, reason or even the normal rules of interpretation. The author further expresses that a right that is deemed to exist but cannot be exercised is not a right at all and makes nonsense of this important safeguard and right.

<sup>128</sup> Though a particular right can be restricted by an express provision in the Constitution, however in the instance, there is no such proviso expressly restricting the said right.



to the police for up to 60 days to decide when if such right granted would not interfere police investigation.

In answering in the affirmative the courts have adopted a two fold approach in dealing with this fundamental issue in that although due recognition is given to the fact that the right to consult counsel begins right from the day of arrest, nevertheless, the courts have imposed certain legitimate restrictions to which reference is made to the guidelines enunciated though obiter of Syed Agil Barakbah J in **Ramli bin Salleh v Inspector Yahya bin Hashim**<sup>129</sup> which is constructive in the present discussion and thus divided in the following:

*"... the right of an accused person remanded in police custody, to consult and be defended by a legal practitioner of his own choice as embodied in clause (3) of Article 5 of the Constitution begins right from the day of his arrest even though police investigation has not yet been completed."*

*"On the other hand, the law also requires the police to carry out investigations in order to satisfy the constitutional requirement of clause (1) of Article 5 with a view to bringing offenders to justice. It is in that respect and towards that end that the fundamental right of the accused to consult counsel of his own choice should be subject to certain legitimate restrictions which necessarily arise in the course of*

---

<sup>129</sup> [1973] 1 MLJ 54, an application for habeas corpus came before the court. The prisoner in this case was arrested on 8<sup>th</sup> Aug 72 by the police and was produced within 24 hours before a magistrate who on the application of the police ordered the prisoner to be remanded for a period of eleven days under section 117 of the CPC as he was satisfied that that police investigation would not be completed within 24 hours. On 9<sup>th</sup> Aug counsel for the prisoner who was retained by his father in law, the applicant in the instance, asked the police for permission to see him to which in reply the police said



*police investigation, the main object being to ensure a proper and speedy trial in the court of law.”*

The learned judge in defining the scope of restriction held that it may relate to time and convenience of both the police and the person seeking the interview and as such, should not be subject to any abuse by either party, for instance, by the police in unreasonably delaying the interview or by counsel in demanding an interview at any time that suits him or by interference with investigation.<sup>130</sup> However what was ailing in this case was the Federal Court’s stand in refusing to make a ruling on a point of law of such considerable importance to the public<sup>131</sup> for which they<sup>132</sup> considered to be abstract matters or rather of academic interest. It should be pointed out that despite the circumstance of the case that the ruling was uncalled for,<sup>133</sup> nevertheless it is opined that the Federal Court in the instance should have made a ruling on this point regardless of the reasons made known<sup>134</sup> for it is in principle that the Federal Court is not bound by its own decision and therefore any ruling or opinion made could be made subject to the circumstance of each case appearing before them.

---

that the counsel could only see the prisoner after their completion of investigation which was on 19<sup>th</sup> Aug.

<sup>130</sup> These restrictions was also recognised in *Lee Mau Seng v Minister for Home Affairs, Singapore & Anor* [1971] 2 M.L.J 137, where the learned Chief Justice Wee Chong Jin C.J expressed in obiter dicta that an arrested person is (under *Article 5(3) of the Federal Constitution*) ‘beyond a shadow of doubt entitled to this constitutional right granted to him by the authority who has custody of him after his arrest and this right must be granted to him within a reasonable time after his arrest’. Therefore following the learned Chief justice obiter, one can conclude that that the right to counsel should be allowed within a reasonable time after the arrest.

<sup>131</sup> Syed Agil Brakbah J made a ruling on this point

<sup>132</sup> A full bench of the Federal Court consisting of H.T. Ong C.J, Suffian, Gill, Ali and H.S. Ong, F.J.J unanimously refused to give an opinion on this point.

<sup>133</sup> The solicitor upon the instruction of the applicant filed an originating motion for a writ of habeas corpus on 12<sup>th</sup> Aug however the prisoner was released on 14<sup>th</sup> Aug and the originating motion came before the court on 15 Aug and despite the subject matter of the originating motion ceased to exist the judge in considering importance of the points raised by counsel, moved on to make a ruling.



In taking cognisance of the above decision and in *Ooi Ah Phua V Officer in Charge, Criminal Investigations Kedah Perlis*, it is submitted that although the courts do recognise that an immediate right to counsel upon arrest exists, nevertheless iterated that this right can be reasonably delayed on several grounds. Therefore, delay was reasonable taking into account the nature of offence committed, time and place. Following which it would be timely to address the judgment of Suffian LP<sup>135</sup> following the sentiments echoed by Syed Agil Barakbah J<sup>136</sup> (though obiter) in the following paragraphs:

*"A balance must be struck between the right of the arrested person to consult his lawyer on the one hand and on the other the duty of the police to protect the public from wrongdoers by apprehending them and collecting whatever evidence exists against them. The interest of justice is more important as (sic) the interest of an arrested person and it is well-known that criminal elements are most of all deterred by the certainty of detection, arrest and punishment."*<sup>137</sup>

---

<sup>134</sup> The Federal Court under section 48 has no jurisdiction to determine abstract matters or matters of academic interest; that the judge when making the ruling was already functus officio; and that the prisoner was already released.

<sup>135</sup> Suffian LP in delivering his judgment agreed with the view adopted by Bhide J in *Sundar Singh v Emperor*, AIR 1930 Lahore 945 who said at p 947 that the right of a prisoner to have access to legal advice must of course be subject to such legitimate restrictions as may be necessary in the interests of justice in order to prevent any undue interference with the course of investigation. He further explains that a legal adviser cannot claim to have interviews with a prisoner at any time he chooses and if there are any good reasons to believe that a particular pleader has abused or is likely to abuse the privilege that pleader may be refused an interview and it is on the police to substantiate so.

<sup>136</sup> His Lordship Suffian LP in the instance held that it was reasonable for the police to deny counsel to interview the arrested person on Dec 30, 1974 bearing in mind that there had been a day light robbery committed in the heart of the state capital involving the use of a pistol and the loss of \$ 14,000/- to \$ 15,000/- not to mention the loss of one life and that as many young men are prepared to go to any length in the pursuit of instant wealth, armed robberies are therefore quite common, and therefore justified the police to give access to counsel for the first time only on January 5, 1975.

<sup>137</sup> Ibid at p 200



Further, Suffian LP in *Ooi Ah Phua* observed that it was reasonable<sup>138</sup> for the police to deny the accused his fundamental constitutional right for 6 days, it is emphasised that the constitutional right to counsel should be accorded to an accused person regardless of the fact that he is being detained and investigated for a serious crime and to delay even for 6 days this right on these fragile grounds would go against the very notion of the presumption of innocence<sup>139</sup> as the accused is taken to be innocent until proven guilty. To deny the right to counsel at the investigation stages where the presumption is opined being far greater to exist is evidence of extensive curtailment of the rights of an accused person and in the words of Cunliffe J in *Sudha Sindhu Dey v Emperor*:<sup>140</sup>

‘... unless in certain offences persons are directed by the government to be tried by drumhead Court martial, it is of paramount importance that advocates should have access to their clients and should obtain all support they are entitled to look for in seeking such (sic) success. The more serious the offence the greater the need of the advocate's help ...’

<sup>138</sup> Syed Othman J in considering the issue of reasonableness held in *Public Prosecutor v Mah Chuen Lim and Others* [1975] 1 MLJ 95, at p 96 that in the absence of a prescribed time reference should be made to section 38 of the *Interpretation and General Clauses Ordinance, 1948*, which applies to the *Constitution* (See Eleventh Schedule, where section 38 provides that when no time is prescribed or allowed within which anything shall be done, such thing shall be one with all convenient speed and as often as the prescribed occasion arises) where particular reference is made to ‘such thing shall be done with all convenient speed’ under the said section (A similar provision can be found in section 54(2) of the *Interpretation Act 1967*, which applies to legislation set out in section 2) The court therefore in the instance held that convenient speed would depend on the circumstances of each particular given case and therefore rejected the idea of providing a predetermined speed of convenient to all cases as it would be to rigid an application in the instance.

<sup>139</sup> Jerald Gomez at p 6 opines in disagreement that the type of crime, where it was committed, that young men are prepared to go to any length in the pursuit of wealth, that armed robberies are common, the subject matter and amount of the stolen goods or even proposition that criminal elements are most deterred by the certainty of detection, arrest and punishment has anything to do with the constitutional right guaranteed under the *Constitution*.

<sup>140</sup> [1935] AIR Cal. 101



Therefore, the law in Malaysia is that the right to counsel does not exist immediately upon arrest, but left to the good judgment of the police or rather left to the unwary discretionary hands of the police to grant the said right on a balance of reasonable convenience.

In *Nasharuddin*, the applicant was denied access to counsel and contested that the denial had impeded the applicant's solicitors from discharging their duties as they were unable to get clear instructions from their client. Although the court recognized that *Article 5(3) of the Federal Constitution* does not expressly or impliedly provide in anyway the police the authority to deny detainees access to legal representation and that such fundamental liberty in the instance are never at the police discretion, nevertheless, held that when a detainee does exercises his right it would be left to the good judgment of the police<sup>141</sup> in the absence of any mala fide on the part of the police exercising such discretion and if such the case may be the onus of showing breach rested on the applicant.<sup>142</sup>

Further in *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals*,<sup>143</sup> the Federal Court in considering, inter alia, breach of *Article 5(3) of the Federal Constitution* and the effect of its breach,<sup>144</sup> stressed that since detention orders

---

<sup>141</sup> In conformity with the decision in *Ooi Ah Phua v Officer in Charge of Criminal Investigation, Kedah/Perlis* [1975] 1 MLJ 93

<sup>142</sup> Suriyadi Halim Omar J held: The constitutional right of a detainee "to consult and be defended by a legal representative of his choice" as worded in *Article 5(3)* would be meaningless if he could simply be denied access by an administrator. However, following the decision in *Theresa Lim Chin Chin v Inspector General of Police* [1988] 1 MLJ 293, [1988] 1 LNS 132 SC, the time at which the detainee may exercise his right "to consult and be defended by a legal representative of his choice" has to be left to the 'good judgment' of the police. The onus of showing a breach of *Article 5(3) of the Federal Constitution* rested on the applicant

<sup>143</sup> [2002] 4 MLJ 449

<sup>144</sup> The evidence before their lordship were clear in that it was undeniable that the appellants were being denied any contact nor communication with their solicitor or family members throughout the period of detention despite futile written request made by the appellants solicitors for the said purpose to which the respondents argued that although such a right existed nevertheless that right is suspended throughout the maximum period of detention of 60 days and therefore were entitled under the law that throughout the said detention to go about their investigations without any form of interference and for this reason that the written request from applicants counsels were rejected and as



under *section 8 of the ISA 1960* were made against all but one applicant,<sup>145</sup> the police must act promptly and professionally in their investigation, so as not to run down time as to when the appellants are allowed their fundamental right to consult counsel, which could be denied up to the maximum period of detention allowed in the pretext that investigation is still ongoing.

The court in weighing the balance between the interest of the state on one hand and the interest of the detainees on the other, held that, in allowing access only after the expiry of the appellants detention is conduct unreasonable and a clear violation of *Article 5(3) of the Federal Constitution*, which supports the appellants contention<sup>146</sup> that the denial to the right counsel amounted to mala fide on the part of the police that the *ISA 1960* was used for collateral purpose.

The Court further dismissed the respondent's claim that they had absolute powers throughout the said 60 day detention to refuse access to counsel.<sup>147</sup> The Court emphasised that the *ISA 1960* makes no provision as to absolute denial of the right to counsel throughout the entire 60 day detention period and therefore, strongly criticise that to deny access at the earlier stages of detention is reasonable but to deny such fundamental right throughout the detention period makes a mockery of *Article 5(3) of the Federal Constitution*.<sup>148</sup>

---

such should not be interpreted to mean an outright denial and therefore deny any form of bad faith on their part.

<sup>145</sup> Detention orders under *section 8 of the ISA 1960* were issued against the first, third, fourth and fifth appellants following their initial detention under *section 73(3) of the ISA 1960*. The second appellant was released on the fifty-second day of his detention.

<sup>146</sup> The Federal Court referred to *Ooi Ah Phua Phua v Officer in Charge of Criminal Investigation, Kedah/Perlis* [1975] 1 MLJ 93 and *Theresa Lim Chin Chin & Ors v Inspector General of Police* [1988] 1 MLJ 293 as the correct test in that the onus of proving breach rested on the applicant to show that there was mala fide on the part of the police to deliberately obstruct the right to counsel.

<sup>147</sup> Following *Hashim bin Saud v Yahya bin Hashim & Anor* [1977] 2 MLJ 116

<sup>148</sup> At p 516



However in *Noor Ashid bin Sakib v Ketua Polis Negara*<sup>149</sup> the court held that there was no mala fide on the part of the police denying the right in the instance. Here the applicant who was a religious teacher at the Madrasah Al-Masriyah Simpang Rengam and a member of Parti Islam Malaysia was detained under the *ISA 1960* pending enquiries.<sup>150</sup> The issue before the court was whether, there was bad faith on the police in refusing to allow visitation by relatives and counsel pending investigation. The court in refusing an application of habeas corpus held the onus of proving breach of *Article 5 (3) of the Federal Constitution* was on the applicant to show that the police had deliberately and with bad faith obstructed the applicant from exercising his right under the aforesaid *Article*<sup>151</sup> and in the instance had failed to do so. It appeared that the refusal was due to pending ongoing but yet unfinished investigation and therefore not a denial of the right to counsel<sup>152</sup> and for these reasons,<sup>153</sup> habeas corpus was refused. The applicant had failed to show that the respondent had acted in bad faith in deliberately obstructing the applicant from exercising his said right when investigation was yet to be completed<sup>154</sup> and therefore were of the opinion that access at this time should not be given unlike in the case of *Mohamad Ezam*.<sup>155</sup>

However in respect of the above decision, it is expressed that there would be minimal or no harm at all, in at least, allowing the detainee to see his family. By

<sup>149</sup> [2002] 5 MLJ 22

<sup>150</sup> The applicant was detained under section 73 for more than 30 days but less than 60 days and there were no order of detention under section 8 made against the applicant.

<sup>151</sup> Though the court acknowledge that the applicant has an undeniable right to counsel nevertheless held that in the instance the said right was suspended, following *Theresa Lim Chin Chin & Ors v Inspector General of Police* [1988] 1 MLJ 293

<sup>152</sup> See p 34F-G

<sup>153</sup> It should be noted that in the instance the applicant had also failed to show that the detention was unlawful. Given that all procedural requirements had been met, the detention of the applicant for the period exceeding 30 days but yet not exceeding 60 days was clearly lawful according to the court.

<sup>154</sup> See enc 7 exh 'PS-I' which the court upon perusing the exhibit of the letter by the police that any visitation by family may obstruct investigation held that it did not show any bad faith and should be accepted



denying any family visitation, may only cause emotional trauma on the family as they may not know the whereabouts and safety of their loved ones in detention.

In *Abdul Ghani Haroon v Ketua Polis Negara & Anor Application*<sup>156</sup> the applicants who were members of the political party Parti Keadilan Nasional were separately arrested under *section 73(1) of the ISA 1960*.<sup>157</sup> The police denied access to family members, lawyers and members of the SUHAKAM whom in particular pursuant to *section 4 (2) (d) of the Human Rights Commission of Malaysia Act 1999* (Act 597), the Commission, in discharging its function, visit places of detention in accordance with procedures as prescribed by the laws relating to the places of detention and to make necessary recommendations.

The court held that, apart from the non-compliance of the provisions of the *ISA 1960* and of the *Federal Constitution*,<sup>158</sup> further held that it was unacceptable and in the instance deliberate and unreasonable on the part of the police to deny access to family members for almost 40 days on grounds that by allowing access to family members would impede police investigation.<sup>159</sup> In fact Mohd Hishamudin J states that, to deny such access for such a period is cruel, inhuman and oppressive not only to the applicant but to their families.<sup>160</sup> It is iterated that such denial of access to visitation, especially in regards to the right to counsel is a gross violation of a fundamental right enshrined in the *Federal Constitution*.

Thus, the court stressed that such denial of right in the instance is a clear manifestation of unlawfulness on the part of the police in exercising their discretion as

---

<sup>155</sup> In the case of *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals* [2002] 4 MLJ 449, access was not given until the expiry date of detention

<sup>156</sup> [2001] 2 MLJ 689

<sup>157</sup> Both application (the other being GobalaKrishnan a/l Nagappan) were heard together by consent of both parties

<sup>158</sup> *Id.* 704, the provisions include non-compliance with sections 73(1), (3)(a), (b), (c) of the *ISA 1960*, and non-compliance with *Article 5(3) of the Federal Constitution*.

<sup>159</sup> The joint letter of the Inspector General and the Director of Special Branch (translated) clearly state that, any visitation from both the family and counsel would impeded on going police investigation.



regards must be adhered to the *Federal Constitution*, which is the highest law of the land, and not the *ISA 1960*, as it is at the police station that the real trial begins. Therefore, such fundamental rights should not be enforced blindly but be interpreted and carried out as humanely as possible.<sup>161</sup>

Although the decision of the Federal Court is most welcoming, nevertheless, the suggestion that a visitation by a counsel if permitted, could be monitored in the presence of the police is definitely contradictory to the principle of legal professional privilege, where free communication between a lawyer and his detained client is a fundamental right which is essential in a democratic society, and above all, in the most serious of cases.<sup>162</sup>

It is submitted that the proposition, that the police are entitled to refuse visit by counsel in the pretext that if granted, would be prejudicial to their investigation, defies logic for a right of such constitutional stature, but most importantly, in the given context, such refusal by the police implies a presumption of guilt not only on the part of the detainee at the very beginning of the criminal process, but also extends to the detainee's legal counsel, whom is regarded as an officer of the court. It is emphasised that in no circumstances will the presence of counsel during police investigation obstruct police investigation,<sup>163</sup> but rather, it promotes justice in the sense that, there

---

<sup>160</sup> *Id.* 703H, 704B

<sup>161</sup> Mohd Hishamudin at p 707B

<sup>162</sup> *S v Switzerland* [1991] 14 E.H.R.R 670

<sup>163</sup> It is reiterated that it would be very rare a case a legal counsel impeding police investigation, however, one could quickly point out at the high occurrence of abuse of police powers, which, would likely to cause miscarriage of justice. Human Rights and Administration of Criminal Justice in India, Prof S.P. Srivastava in Human Rights and Criminal Justice Administration in India Prod (Dr) Noorjahan bava (ed) (2000) Delhi, Upal Publishing House p 134 at p 141 stated that "the main culprits of human rights abuses are police, prisons and the State... Police in our context has a long history of law-breaking. Its record of little regard of human rights is not a thing of the past; it is flourishing now as ever before. Our police has (sic) perfected a torture technology of a horrible and horrendous kind. It consists of several ingenious ways of torture and tyranny, all in the name of crime prevention and control. In the arrogance of authority the policemen often become the worst violators of law. In the garb of combating criminality, the police take (sic) law into their own hands and systematically violate the basic rights of individuals and groups of people belonging to weaker sections - those who are unresourced and under privileged."



would be a share balance of power between the police and the accused in the presence of his counsel and it is reiterated that, to thwart otherwise, is akin to referring a legal counsel in the instance an accomplice to the alleged offence being investigated for.

The police should be mindful that a counsel is an Advocate and Solicitor of the High Court of Malaya, he is a practitioner, meaning an authorised person, holding a valid practise certificate pursuant to the *Legal Profession Act 1956* and therefore an officer of the court. Therefore, it would be highly unlikely that the counsel would impede police investigation, for counsel upholds and strives for justice, and in the instance would be timely to gesture the statement of Arthur Goldberg J in *Escobedo v Illinois*<sup>164</sup> in dealing with an accused person's right to consult counsel, held:

*"No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system"*

Although the accused person is well protected under *Part II of the Federal Constitution*, nevertheless, with the abundance of anti-terrorism laws, and in particular the *ISA 1960* effectively curtails the right to be presumed innocent. The lack of effective safeguards under the *ISA 1960* as oppose to the *CPC* is evident; that the *ISA* detainees may succumb to constant wide range of abuses. Under the *CPC*, an arrested person is to be produced before a magistrate within twenty-four hours, and thereafter, any form of further detention is made only with the authority of the

---

<sup>164</sup> [1964] 378 U.S.478



magistrate for no more than 14 days for investigation.<sup>165</sup> However under the *ISA 1960*, the police can detain a suspect for up to 60 days without any judicial authorisation for such detention. This is clear disregard to fundamental due process of law which if not observed, may infringe procedural rights such as the right to a fair trial and the right to counsel.<sup>166</sup>

Apart from the non-observance of the procedural rights, Human Rights Watch observes that the *ISA* detainees are held under extreme conditions of detention<sup>167</sup> falling short of the *Standard Minimum Rules for the Treatment of Prisoners*<sup>168</sup> This system of preventive detention which curtails judicial and procedural safeguards may further lead to detainees being subject to physical abuse and torture, in which Human Rights Watch observes that such abuses are commonly inflicted on *ISA* detainees.<sup>169</sup>

It is reiterated that what makes the *ISA 1960* the number one enemy of the presumption of innocence is that the provisions therein especially *section 8*, provides the Executive absolute power, without any recourse for judicial review to deprive a person of his or her liberty indefinitely without trial solely for preventive reasons. Further, in the absence of effective safeguards, especially in relation to the powers of the Advisory Board, incongruously a necessary creature within the scheme of *the ISA 1960*, taken together with the substandard legal interpretation of *Article 5(3) of the Federal Constitution* in regards to the exercise of an accused right to counsel makes it

---

<sup>165</sup> *Section 117 of the CPC*

<sup>166</sup> Professor Wu Min Aun, School of Law, Northern Territory University, Australia., Keynote Address at Conference on Human Rights and the Administration of the Law: Human Rights and Law Enforcement (Kuala Lumpur 9-10 September 2003) (<http://www.cdu.edu.au/law/staff/wu/wu2.htm>)

<sup>167</sup> The condition of detention cells according to former detainees is that the cells are usually 8 feet square, with no mattress, no pillow and no bedclothes. There are no windows and a 100-watt bulb was on 24 hours a day. Human Rights Watch, Vol. 16, No. 7 (C), at pp 30-32

<sup>168</sup> *Id.* 32, pursuant to Articles 10, 11 and 19 of the *U.N. Standard Minimum Rules for the Treatment of Prisoners*

<sup>169</sup> Human Rights Watch, Country Summary (January 2006) ([www.hrw.org](http://www.hrw.org)). For further reading of abuses against *ISA* detainees, see: Human Rights Watch, Vol. 16, No. 7 (C), at pp. 20-22



more conclusive, as to why the *ISA 1960* is regarded a potential threat to fundamental rights enshrined in the *Federal Constitution*.

Although to some extent the powers under the *ISA 1960* in relation to police detention under *section 73* has been curtailed and is now put under the microscope of judicial purview, but in the overall, much is left desired as the presumption of innocence under the *ISA 1960* is effectively curtailed.

#### 4.5 Conclusion

The *ISA 1960* over the years since its inception has been used in manifold. It is a reflection of the potency of the Government to suppress fundamental rights in times of necessity, especially in the fight against terrorism. Whether or not detainees under the *ISA 1960* have actually committed an illegal act will not be known until they are brought to trial in court of law. It is further observed that ordinary laws such as the *CPC* offer far better protection as compared to an accused person held under the *ISA 1960*. The justification may lie on the severity of the offence under the *ISA 1960* that warrants some form of curtailment of fundamental rights.

Although such may be the case, the law should balance that need to protect the security and welfare of the State against the protection of fundamental liberties. However, this is not the case here as it is observed that the effective removal of judicial review of *section 8* orders, the lack of sound judicial reasoning on judicial review of such orders by the judiciary and the denial of the right to counsel are all testamentary of gradual curtailment of fundamental rights, specifically the presumption of innocence at the expense of protecting the security of the State.



Thus, it seems that the integrity of our criminal justice system is susceptible to terrorism laws. It is observed that laws are passed as effective measures to provide a safe environment for every citizen from harm, but terrorism laws and specifically the *ISA 1960* on the other hand, instils fear on every Malaysian citizen. The reason is obvious; detention without trial, wide practise of abuse by law enforcement authorities and the lack of effective safeguards as a whole, only gains fear and condemnation for such laws.

principles of English common law, which encompasses fundamental principles of natural justice and to which, has been streamlined within our Malaysian legal system.<sup>171</sup> Therefore, it goes without saying that fundamental British traditions of civil liberties and due process has been well incorporated within the legal systems of the member states of the Commonwealth, including Malaysia, when were once ruled by the British empire.

Although the legal system of England and Wales has always been viewed as a yardstick for protection of fundamental rights and liberties, however, much has changed since the inception of the *Anti-Terrorism Crime and Security Act 2001* (hereinafter the '*ATCSA 2001*') and the *Prevention of Terrorism Act 2005* (hereinafter the '*PTA 2005*'). The inception of the *ATCSA 2001* which introduces indefinite detention exclusively applying only to foreign terrorist suspects and the *PTA 2005* which introduces control order indiscriminately, potentially depart from the well established traditional concepts of due process, which are regarded as norms of the criminal justice system of England and Wales.

<sup>170</sup> Both England and Wales share a common legal system. For further reading of the historical development of the United Kingdom to what are as Wales, see, Wade and Bradley: *Constitutional and Administrative Law*, Edited by A.W. Bradley & Keith Ewing (11<sup>th</sup> Edition) 91, 93 pp 18-39

<sup>171</sup> *Attorney-Gen v Donoghue (The Ship)* [1940] 4 All ER 278, following *Catell Jones v Public Prosecutor*, [1966] 1 MLJ 113 and *Cheng Si-Chuan v PP* [1961] 1 MLJ 64, at p 71.

## ANTI-TERRORISM LAWS IN ENGLAND &amp; WALES

## 5.1 Introduction

The comparative study is in relation to the prevailing anti-terrorism laws in England & Wales.<sup>170</sup> It is observed that the *Federal Constitution of Malaysia* is founded on the Westminster model of England and Wales and therefore to some extent, has inherited principles of English common law, which encompasses fundamental principles of natural justice and to which, has been streamlined within our Malaysian legal system.<sup>171</sup> Therefore, it goes without saying that fundamental British traditions of civil liberties and due process has been well incorporated within the legal systems of the members states of the Commonwealth, including Malaysia, whom were once ruled by the British empire.

Although the legal system of England and Wales has always been viewed as a yardstick for protection of fundamental rights and liberties, however, much has changed since the inception of the *Anti-Terrorism Crime and Security Act 2001* (hereinafter the '*ATCSA 2001*') and the *Prevention of Terrorism Act 2005* (hereinafter the '*PTA 2005*'). The inception of the *ATCSA 2001* which introduces indefinite detention exclusively applying only to foreign terrorist suspects and the *PTA 2005* which introduces control order indiscriminately, potentially depart from the well established traditional concepts of due process, which are regarded as norms of the criminal justice system of England and Wales.

<sup>170</sup> Both England and Wales share a common legal system. For further reading of the historical development of the United Kingdom in relation to Wales, see; Wade and Bradley: Constitutional and Administrative Law, Edited by A.W. Bradley & Keith Ewing (11<sup>th</sup> Edition) ELBS pp 38-39

<sup>171</sup> *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 CLJ 378, following *Che Ani Itam v Public Prosecutor* [1984] 1 MLJ 113 and *Ong Ah Chuan v PP* [1981] 1 MLJ 64, at p 71



## 5.2 A Human Rights Culture

England and Wales to some degree is respected as a human rights culture and such was the conviction placed by the Government on the importance of human rights within its legal framework that it decided to pass the *Human Rights Act 1998* despite having ratified the *European Convention on Human Rights*, thereby incorporating the *Convention* rights into domestic law.<sup>172</sup> The *Convention* treaty made major impact in that it always had an influence in the outcome of political and judicial decisions of contracting states and as such, it warrants a brief mention of the framework of the *Convention* treaty.

The significance of the *Convention* is that it provides any person<sup>173</sup> a right of individual petition to the *European Court of Human Rights*<sup>174</sup> and the decision of the Court is final and binding.<sup>175</sup> The Court's judgments are more than merely declaratory in nature, despite the Court not having the jurisdiction to quash the decision of a national authority, or to overturn a criminal conviction.<sup>176</sup> Nevertheless, it is important to note that the contracting States are under an obligation to abide by the decision of the Court in any case to which they are parties.<sup>177</sup> It is observed that the *Convention* broke new ground in international law in three important respects; firstly, it adopted a principle of collective enforcement of human rights; secondly, the inclusion of a right of an individual petition and finally, the establishment of supervisory machinery to

---

<sup>172</sup> Lord Hope in *R v DPP, ex parte Kebilene* [1999] 3 WLR 972 at para. 838 said that although the *Human Rights Act 1998* is not yet in force, the vigorous public debate that accompanied its passage through Parliament has already had a profound effect on thinking about issues of human rights. It is now plain that the incorporation of the *European Convention on Human Rights* into our domestic law will subject the entire legal system to a fundamental process of review and, where necessary, reform by the judiciary.

<sup>173</sup> This may include non-governmental organisation or group of individuals

<sup>174</sup> *Article 34 of the Convention*, which is subject to exhausting all other remedies pursuant to *Article 35 (1) of the Convention*

<sup>175</sup> *Article 46(1) of the Convention*

<sup>176</sup> Ben Emerson QC & Andrew Ashworth QC, Sweet & Maxwell 2001 at p 3

<sup>177</sup> This obligation is enforceable by the Committee of Ministers of the Council of Europe which has the task of supervising the execution of the Court's judgment under *Article 46(2) of the Convention*



interpret, apply and enforce the *Convention*.<sup>178</sup> The influence of the *Convention* on its contracting States grew in stature that it was treated as a constitutional instrument of European public order in the field of human rights.<sup>179</sup>

Although the *Convention* embodies a comprehensive framework of fundamental rights which is well protected, nevertheless, it also provides contracting States the power to derogate from its obligation arising under this *Convention*, in time of war or other public emergency threatening the life of the nation.<sup>180</sup> This is where it becomes apparent that the rights reflected in the *Convention* especially in relation to *Article 5 of the Convention* are not absolute<sup>181</sup> and can be derogated in times of emergency, but the prohibition against torture under *Article 3 of the Convention* cannot be derogated.<sup>182</sup> England and Wales had in the past in relation to the conflict with Northern Ireland, derogated itself from obligation arising under the *Convention* in particular to *Article 5*.<sup>183</sup> Now in light of the circumstances permitted by the *ATCSA 2001*<sup>184</sup> that requires a necessary derogation in order to make the *ATCSA 2001* compatible with *Convention* obligations<sup>185</sup> and with the *Human Rights Act 1998*.<sup>186</sup>

<sup>178</sup> Ben Emerson QC & Andrew Ashworth QC, Sweet & Maxwell 2001 at p 5-7

<sup>179</sup> *Chrysostomos, Papachrysostomou and Loizidou v Turkey* [1991] 68 D.R.216 at 242

<sup>180</sup> *Article 15 of the Convention*

<sup>181</sup> Human Rights Watch Briefing Paper, Neither Just nor Effective, Indefinite Detention Without Trial in the United Kingdom Under Part 4 of the *Anti-Terrorism, Crime and Security Act 2001* (June 24, 2004) Human Rights Watch, at p. 5

<sup>182</sup> *Ibid*

<sup>183</sup> In *Brogan v United Kingdom* [1988] 11 EHRR 117, the European Court of Human Rights held that the 4 days detention for interrogation without access to a judge violated *Article 5(3)* which required that anyone arrested shall be brought promptly before a judge or other officer authorized by law to exercise judicial power. However the government entered derogation pursuant to *Article 15* and justified that the conflict in Northern Ireland was an emergency threatening the life of the nation and the provisions under the *Prevention of Terrorism (Temporary Provisions) Act 1989* which allowed the police to detain for up to 7 days were necessary.

<sup>184</sup> The *Convention* only allows Immigration detention pursuant to *Article 5 (1) (f)* which provides that detention is only lawful where action is being taken with a view to deportation or extradition.

<sup>185</sup> Human Rights Watch Briefing Paper, *Loc. cit.*, The UK government formally derogated from *Article 5(1) (f) of the Convention* on December 18, 2001 and at the same day informed the United Nations Secretary General that a public emergency within the meaning of *Article 4(1) of the International Covenant on Civil and Political Rights* existed in the UK.

<sup>186</sup> *Ibid*, section 1 (2) *Human Rights Act 1998*



### 5.3 Anti-Terrorism Laws in England and Wales

It is observed that although England and Wales do not have a written constitution unlike Malaysia, nevertheless, it has a set of legal rules<sup>187</sup> whereby in terms of legal effect, an Act of Parliament is supreme.<sup>188</sup> Therefore, by virtue of its prevailing stature within the laws of England and Wales, Parliament apart from the *ATCSA 2001* and the *PTA 2005*, had passed before, various anti-terrorism laws in the following:<sup>189</sup>

- i) *Prevention of Violence (Temporary Provisions) Act 1939*
- ii) *Northern Ireland (Emergency Provisions) Acts 1973-1998*
- iii) *Prevention of Terrorism (Temporary Provisions) Acts 1974-2001*
- iv) *Terrorism Act 2000*

It has to be mentioned that the war on terrorism in England and Wales is not something new as it has been a permanent facet within the political arena of the United Kingdom<sup>190</sup> and which to a certain degree, what Malaya then, experienced during the insurgency of the communist party.<sup>191</sup> Although in the past these counter terrorism laws were temporary in nature,<sup>192</sup> the government decided to review its stand, as the war against terror no longer reflected a political fight against the IRA but

<sup>187</sup> These sources of legal rules include Acts of Parliament, Judicial Precedent or Case law, Customs and Constitutional Conventions. For further reading see Wade and Bradley: Constitutional and Administrative Law, Edited by A.W. Bradley & Keith Ewing (11<sup>th</sup> Edition) ELBS pp 13-33

<sup>188</sup> *Id.* 69. This proposition that Parliament is supreme is well founded in the famous passage of A.V. Dicey, who states that; Parliament has under the English constitution, the right to make or unmake any law whatever; and further that no person or body is recognized by the law of England as a having a right to override or set aside the legislation of Parliament.

<sup>189</sup> Note: Measures i), ii) and iii) are temporary in nature and were passed during the insurgence of the IRA in Britain to which some of the measures were quick response to Birmingham pub bombings in 1974 and Bloody Sunday in 1972. Clive Walker, Terrorism and Criminal Justice: Past, Present and Future (2004) Crim.L.R. pp 55-57

<sup>190</sup> *Ibid*

<sup>191</sup> See sub chapter 4.2: Terrorism Laws in Malaysia

<sup>192</sup> *Id*

a global threat,<sup>193</sup> which therefore required a permanent and forceful legislation. Although the *Terrorism Act 2000* was not passed in the aftermath of the September 11, 2001 attacks by al Qaeda, however the ensuing legislation was; the *ATCSA 2001* and the *PTA 2005* was a reflection of Parliament's hard stand in tackling terrorism, more so in light of the London bombings by terrorist.

#### 5.4 Presumption of Innocence under the ATCSA 2001

It cannot be denied that the *ACTSA 2001* which was passed on 14 December, 2001 was an immediate response by the Government in the aftermath of the horrific September 11 attack.<sup>194</sup> Among the most controversial provision of the *ATCSA 2001*<sup>195</sup> that contravenes the presumption of innocence is *Part 4 of the Act*, which provides for detention without trial of foreign persons. The Secretary of State in defence of the offending provision stresses that; so long as the public emergency subsists, where a person is suspected of terrorism but cannot currently be removed and for whom a criminal prosecution is not an option, believe that it is necessary and proportionate to provide for extended detention, pending removal.<sup>196</sup> Such is the magnitude of harm that may be potentially inflicted on an accused person under such terrorism laws that it warrants reciting the relevant provision in full below.

---

<sup>193</sup> Legislation against terrorism (Cm.4178, London, 1998)

<sup>194</sup> H. Fenwick, *The Anti terrorism, Crime and Security Act 2001* (2002) 65 M.L.R. 724

<sup>195</sup> The *ATCSA 2001* has altogether 14 parts. Part 1 deals with Terrorism Property, Part 2 deals with Freezing Orders, Part 3 deals with Disclosure of Information, Part 5 Race and Religion, Part 6 deals with Weapons of Mass Destruction, Part 7 deals with Security of Pathogens and Toxins, Part 8 deals with Security of Nuclear Industry, Part 9 deals with Aviation Security, Part 10 deals with Police Powers, Part 11 deals with Retention of Communications Data, Part 12 deals with Bribery and Corruption, Part 13 deals with the Third Pillar of the European Union, Dangerous Substances, Intelligence Services Act 1994 and *Terrorism Act 2000* (<http://www.opsi.gov.uk/acts/acts2001/20010024.htm>)



#### 5.4.1 Part 4 of the ATCSA 2001

##### Section 21 Suspected international terrorist: certificate

- (1) The Secretary of State may issue a certificate under this section in respect of a person if the Secretary of State reasonably-
- (a) believes that the person's presence in the United Kingdom is a risk to national security, and
  - (b) suspects that the person is a terrorist<sup>197</sup>

##### Section 23 Detention:

- (1) A suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by-
- (a) a point of law which wholly or partly relates to an international agreement, or
  - (b) a practical consideration
- (2) The provisions mentioned in subsection (1) are-
- (a) paragraph 16 of Schedule 2 to the *Immigration Act 1971* (c. 77) (detention of persons liable to examination or removal), and
  - (b) paragraph 2 of Schedule 3 to that Act (detention pending deportation)

<sup>196</sup> Secretary of State for the Home Department of 18 November 2003, Home Department-Anti Terrorism, Crime and Security Act (Detentions), Hansard, Column 27WS

<sup>197</sup> Section 21(2) provides terrorist under subsection (1)(b) to mean a person who-

- (a) is or has been concerned in the commission, preparation or instigation of acts of international terrorism
- (b) is a member of or belongs to an international terrorist group or

Therefore pursuant to *section 21 ATCSA 2001*, the Secretary of State is empowered to certify a foreigner as a suspected terrorist on grounds of reasonable suspicion falling short of real evidence and upon satisfying himself, may order detention pursuant to *section 23 ATCSA 2001*. It is observed that the *ATCSA 2001* provides the Executive the power to certify and detain a terror suspect indefinitely, a similar power enjoyed by the Home Minister under *section 8 of the ISA 1960*. It is dispiriting that such powers are left to be exercised by the Executive rather than the judiciary, who should be the final arbiter in determining any form of preventive detention, which potentially infringe the presumption of innocence.

Further any evidence gathered against the suspected terrorist is regarded as matters of national security and are deemed classified. Therefore a suspect who is certified under *section 21 of the ATCSA 2001* as terrorist on such classified evidence cannot be successfully prosecuted and are therefore trapped in limbo.<sup>198</sup>

It is further observed that there exist an apparent distinction between *section 23 of the ATCSA 2001* and *section 8 of the ISA 1960*. In relation to the proviso of *section 23 of the ATCSA 2001*, detention without trial only applies to foreigners and not nationals alike, therefore there is an element of discrimination on grounds of nationality, however, the same cannot be said of *section 8 of the ISA 1960*, which although does not expressly provide so, but it is taken to apply indiscriminately.

The justification for such powers and the application thereof to specific targets under Part 4 of the *ATCSA 2001* is based on the proposition that there were many non-UK nationals in the UK who posed a threat to national security and whom on grounds of reasonable suspicion believed to be involved in international terrorism but falling

---

(c) has links with an international terrorist group



short of any admissible evidence for prosecution.<sup>199</sup> Further, any means of deportation may seemingly be impossible for fear of possible torture upon returning to their home country or that no other country was willing to admit them. This proposition is a reflection of the European Court of Human Rights decision in *Chahal v United Kingdom*<sup>200</sup> in which the European Court rejected the Home Secretary's deportation order on grounds that it infringed protection accorded under *Article 3 of the Convention* which provides that, no one shall be subjected to torture or to inhuman degrading treatment or punishment. The European Court went to state that this protection under *Article 3 of the Convention* was far wider than that provided by *Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees*.<sup>201</sup>

#### 5.4.2 Safeguards: A Reflection of the Presumption of Innocence

Although *sections 21 and 23 of the ATCSA 2001* operate to the detriment of the foreign detainee as they may be held indefinitely, however, there are inherent schemes of safeguards which reflect the operation of the presumption of innocence under the *ATCSA 2001*.

<sup>198</sup> Human Rights Watch Briefing Paper, Neither Just nor Effective, Indefinite Detention Without Trial in the United Kingdom Under Part 4 of the Anti-Terrorism, Crime and Security Act 2001 (June 24, 2004) Human Rights Watch, at p. 6

<sup>199</sup> [http://en.wikipedia.org/wiki/Anti-terrorism%2C\\_Crime\\_and\\_Security\\_Act\\_2001](http://en.wikipedia.org/wiki/Anti-terrorism%2C_Crime_and_Security_Act_2001)

<sup>200</sup> [1996] 23 EHRR 403, Mr Chahal was an Indian citizen and who was an active Sikh separatist whom on this ground the Home Secretary decided to deport him as his continued presence was not conducive to the public good. He resisted deportation on the ground inter alia that if returned to India he would face real risk of death, or of torture in custody contrary to *Article 3 of the European Convention on Human Rights*.

#### 5.4.2.1 The Special Immigration Appeals Commission

The Special Immigration Appeals Commission (hereinafter the 'SIAC') was established in light of the landmark decision in *Chahal*. This case reflects the significance of *Convention* rights and obligations on contracting States, in particular to *Article 3 of the Convention* which cannot be derogated in times of emergency. The function of the SIAC is to review deportation cases involving national security and hence regarded as a special tribunal<sup>202</sup> for the purpose of the *ATCSA 200*. Relatively, the SIAC reflects the Advisory Board under the *ISA 1960* as both bodies provide an opportunity for the detainee to be heard, hence, it reflects the observance of presumption of innocence.

However, the SIAC operates in a system of dual hearings and legal representation unlike the Advisory Body under the *ISA 1960*. The composition of the SIAC is statutorily specified,<sup>203</sup> in which, the proceedings are heard by a panel of three members which include; a High Court judge, who normally presides as the Chairman, a former or current Chief Adjudicator or a legally qualified member of the Immigration Appeal Tribunal and a former or current legally qualified member of the Asylum and Immigration Tribunal. Therefore, the composition of the SIAC and the appointment of the Chairman by the Lord Chancellor, taken together with its membership of equal representation<sup>204</sup> negate any political influence the Secretary of State may exert in the proceedings before the SIAC.<sup>205</sup>

---

<sup>201</sup> *Id.* 80

<sup>202</sup> Human Rights Watch Briefing Paper, Neither Just nor Effective, Indefinite Detention Without Trial in the United Kingdom Under Part 4 of the *Anti-Terrorism, Crime and Security Act 2001* (June 24, 2004) Human Rights Watch, at p. 7

<sup>203</sup> As amended by the *Nationality, Immigration and Asylum Act 2002*

<sup>204</sup> The membership includes 22 judicial members, 13 legal members and 13 lay members. The United Kingdom Parliament, Select Committee on Constitutional Affairs Seventh Report (<http://www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/323/323.06.htm>)

<sup>205</sup> *Ibid*



5.4.2.2 The SIAC provides for both closed and open hearings depending on the nature of the evidence to be heard. As such, each detainee is represented by a special advocate and by his own legal representative of his choice.<sup>206</sup> The justification for a twofold representation is that when the SIAC sits on closed hearings, only the special advocate is granted security clearance before the SIAC to review the classified evidence which forms the basis of the certification under *section 21 ATCSA 2001*, from which the detainee and his legal representative of his choice are excluded. Further, the special advocate is not allowed to discuss the case with the detainee or his legal representative unless a clearance has been obtained first from the SIAC. However, in regards to non-classified evidence which are heard in open hearings, both the detainee and his choice of legal representative are permitted to attend.<sup>207</sup>

Although comparatively the SIAC provides a far better procedural safeguard for a detainee to challenge their detention order made under the *ATCSA 2001* than that provided for under the Advisory Board of the *ISA 1960*, however the SIAC on its own, lacks effective procedural safeguards as access to classified evidence which forms the basis of the certification issued under *section 21 of the ATCSA 2001* is denied to a detainee and his choice of legal representative. The purpose of the SIAC is to provide an opportunity for a detainee to effectively challenge his detention made pursuant to *section 21 ATCSA 2001* and this is only possible if the detainee and his legal representative are allowed access to the very evidence which forms the basis of the certification order.

---

<sup>206</sup> *Human Rights Watch, Loc. Cit.*

<sup>207</sup> *Ibid*

#### 5.4.2.2 Public Emergency Requirement under Article 15 of the Convention

Section 1(2) of the *Human Rights Act 1998* allows the government to derogate from its obligations arising under the *Convention* pursuant to *Article 15 of the Convention* which states that in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this *Convention* to the extent strictly required by the exigencies of this situation. This enables the Government to derogate itself from some of the rights and freedoms without violating the *Convention*<sup>208</sup> and as such, any derogation entered must be proportionate to the legitimate aim pursued.<sup>209</sup> The European Court of Human Rights states that, inherent in the whole of the *Convention* is a search for the fair balance between the demand of the general interest of the Community and the requirements of the protection of the individual's human rights.<sup>210</sup>

Therefore, in order for any contracting State to derogate lawfully from rights and freedoms arising under the *Convention*,<sup>211</sup> the precondition is that there must be public emergency threatening the life of the nation. Although the Government of England and Wales have absolute dictation as to the public emergency requirement, as only they have access to classified evidence, nevertheless in the instance, it is observed that they had failed to satisfying the public emergency requirement on several factors, which among others include; public emergency requirement under *Article 15 of the Convention* is an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the

<sup>208</sup> John Wadham & Helen Mountfield, *Blackstone's Guide to the Human Rights Act 1998* (2<sup>nd</sup> ed) Blackstone Press Limited (2000) at p. 25

<sup>209</sup> *Id.* 18

<sup>210</sup> *Soering v United Kingdom* [1989] 11 ECHRR 439 at para. 89

<sup>211</sup> Apart from the *Convention* the precondition also applies to the *ICCPR* pursuant to Article 4(1).



community of which the State is composed;<sup>212</sup> that no other contracting party had lodged a derogation since 2001, apart from the Government of England and Wales; the lawfulness of the derogation from *Article 5(1) of the Convention* which discriminates on grounds of nationality under *Article 14 of the Convention* as indefinite detention only applied to foreigners; and that it had sufficient laws to combat terrorism without further need for the enactment of the *ATCSA 2001*.<sup>213</sup>

Although the SIAC had acknowledge that there was public emergency within the meaning of *Article 15 of the Convention*, as they had access to both classified and non-classified evidence in arriving to that conclusion, nevertheless, there was all round criticisms<sup>214</sup> and successful applications made by detainees against the derogation which eventually lead to the Part 4 of the *ATCSA 2001* being removed.

The ruling of the nine Law Lords<sup>215</sup> was most welcoming as the majority, including Lord Bingham clearly held that section 23 of the *ATCSA 2001* was incompatible with *Articles 5 and 14 of the Convention* as it was disproportionate and allowed detention of suspected international terrorists in a way that it discriminates on grounds of nationality or immigration status.<sup>216</sup> Lord Nicholls observed that indefinite

<sup>212</sup> Privy Counselor Review Committee, "Anti-terrorism, Crime and Security Review," para. 23, the Newton Committee called for replacing the Part 4 powers which allow detention of foreigners.

<sup>213</sup> [2004] UKHL 31.

<sup>214</sup> All appellants share a common characteristic in that all are foreign nationals.

<sup>215</sup> The appellants argued that their detention was unlawful as it was inconsistent with Convention obligations which were binding on the United Kingdom and that the derogation lodged was ineffective in part, decision and that Part 4 of the *ATCSA 2001* was incompatible with the Convention. Further the SCC in its earlier ruling held that that the *ATCSA 2001* was manifestly discriminatory against foreign nationals as the same did not apply to UK nationals. However on this issue, the House of Lords observed that the *ATCSA 2001* was discriminatory on grounds of

<sup>216</sup> *Lawless v Ireland* [1961] 1 ECHR 1, the European Court upon examining the justification of the Government that there was a public emergency held that there was no violation and accordingly the Irish Government were justified.

<sup>217</sup> For further reading see: Human Rights Watch Briefing Paper, Neither Just nor Effective, Indefinite Detention Without Trial in the United Kingdom Under Part 4 of the Anti-Terrorism, Crime and Security Act 2001 (June 24, 2004) Human Rights Watch, at pp. 7-10.

### 5.4.2.3 Effective Judicial Review

A series of legal challenges were made in relation to the Home Secretary's powers under *Part 4* which was argued as being incompatible with the UK's obligations under the *Convention*. In *A (FC) and others (FC) (Appellants) v Secretary of State for the Home Department (Respondent), X (FC) and another (FC) (Appellants) v Secretary of State for the Home Department (Respondent)*,<sup>215</sup> the nine appellants<sup>216</sup> who were certified by the Home Secretary under *section 21* as suspected terrorist and subsequently detained under *section 23 of the ATCSA 2001* challenged before the House of Lords a decision of the Court of Appeal, which overturned the SIAC's ruling that there was a state of emergency threatening the life of the nation.<sup>217</sup>

The ruling of the nine Law Lords<sup>218</sup> was most welcoming as the majority, including Lord Bingham clearly held that *section 23 of the ATCSA 2001* was incompatible with *Articles 5 and 14 of the Convention* as it was disproportionate and allowed detention of suspected international terrorists in a way that it discriminates on grounds of nationality or immigration status.<sup>219</sup> Lord Nicholls observed that indefinite

---

<sup>214</sup> Privy Counselor Review Committee, "Anti-terrorism, Crime and Security Review," para. 25, the Newton Committee called for replacing the Part 4 powers which allow detention of foreigners.

<sup>215</sup> [2004] UKHL 56

<sup>216</sup> All appellants share a common characteristic in that all are foreign nationals.

<sup>217</sup> The appellants argued that their detention was unlawful as it was inconsistent with *Convention* obligations which were binding on the United Kingdom and that the derogation lodged was ineffectual to justify detention and that *Part 4* of the *ATCSA 2001* was incompatible with the *Convention*. Further the SIC in its earlier ruling held that that the *ATCSA 2001* was unjustifiably discriminatory against foreign nationals as the same did not apply to UK nationals. However on this point, the Human Rights Watch observes that the *ATCSA 2001* was discriminatory on grounds of nationality seemed flawless and was debunked when eight UK nationals were arrested by anti terrorism police under the *ATCSA 2001*, which points that the *ATCSA 2001* applies indiscriminately regardless of nationality. (June 24, 2004)

<sup>218</sup> The case was heard by a panel of nine law lords rather than the usual five due to its constitutional importance. The law lords comprised Lord Bingham, Lord Nicholls, Lord Hoffman, Lord Hope, Lord Scott, Lord Rodger, Lord Walker, Baroness Hale of Richmond, and Lord Carswell

<sup>219</sup> para 73



imprisonment without charge or trial is anathema in any country which observes the rule of law.<sup>220</sup>

The decision of the Law Lords prompted an immediate action by the Government to repeal the *Part 4* powers under the *ATCSA 2001* especially in relation to *section 23* detention orders. However, although indefinite detention under *section 23* was repealed, nevertheless, the Government replaced them with a system of control orders under the *PTA 2005*, which applied indiscriminately.

#### 5.4.2.4 Parliamentary Scrutiny

Over and above what has been aforementioned as being effective safeguards against potential abuse of power by the Executive, another effective form of safeguard is the scrutiny of Parliament of the *ATCSA 2001*, which should be applauded as the *ISA 1960* is not subject to the same by our Parliament. It is within the inherent scheme of the *ATCSA 2001* that the *Part 4* of the *Act* is subject to additional annual review by a member of the House of Lords, notably a Law Lord,<sup>221</sup> as well as periodic consideration by Parliament apart from review for human rights compliance by the Joint Human Rights Committee of Parliament.<sup>222</sup> The Law Lord is empowered within his mandate to ensure that the detention powers under *Part 4* are exercised in a manner consistent with the said *Act*.<sup>223</sup> This form of scrutiny exercised by Parliament ensures that there exist a form of check and balance of the powers exercised by the Executive, but most importantly it reflects that the presumption of innocence is observed to some degree as the liberty of an individual is at stake.

---

<sup>220</sup> para. 74

<sup>221</sup> Currently by Lord Carlile

<sup>222</sup> Human Rights Watch Briefing Paper, Neither Just nor Effective, Indefinite Detention Without Trial in the United Kingdom Under Part 4 of the Anti-Terrorism, Crime and Security Act 2001 (June 24, 2004) Human Rights Watch, at p. 17

<sup>223</sup> *Ibid*

## 5.5 The Presumption of Innocence under the PTA 2005

Although the decision of the House of Lords in *A (FC) and others (FC) (Appellants) v Secretary of State for the Home Department (Respondent)*<sup>224</sup> was encouraging as it led to Parliament repealing the powers under *Part 4* of the *ATCSA 2001* in relation to indefinite detention of foreign suspected terrorist,<sup>225</sup> however, the decision prompted the passage of the *PTA 2005*.<sup>226</sup> The *PTA 2005* effectively replaced the *Part 4* detention orders under the *ATCSA 2001* with control orders, which potentially contravene the presumption of innocence. Amnesty International observes that the UK authorities were wrong in 2001 when they passed the *ATCSA 2001* and are wrong now in regards to the passing of the *PTA 2005*. The *Prevention of Terrorism Bill* contravenes the spirit, if not the letter of the Law Lords judgment.<sup>227</sup> These control orders are designed to restrict or prevent any further involvement by individuals indiscriminately in such activities<sup>228</sup> whether domestic or international.<sup>229</sup> Human Rights Watch observes that the powers vested with the Secretary of State to impose control orders on the basis of reasonable suspicion

---

<sup>224</sup> [2004] UKHL 56

<sup>225</sup> First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005, 2<sup>nd</sup> February 2006, at p.1

<sup>226</sup> The Act received its Royal Assent on March 11, 2005, Third Commons debate (<http://www.theyworkforyou.com/debates/?id=2005-03-10.1854.3>)

<sup>227</sup> UK: The Prevention of Terrorism Bill is a grave threat to human rights and the rule of law, Amnesty International Press Release: 28 February 2005

<sup>228</sup> Explanatory Notes to Prevention of Terrorism Act 2005, Crown Copyright 2005

<sup>229</sup> Section 1(9) defines involvement in terrorism related activity as any one or more of the following-

- (a) the commission, preparation or instigation of acts of terrorism
- (b) conduct which facilitates the commission, preparation or instigation of such acts or which is intended to do so
- (c) conduct which gives encouragement to the commission, preparation or instigation of such acts, or which is intended to do so
- (d) conduct which gives support or assistance to individuals who are known or believed to be involved in terrorism related activity

and for the purpose of this subsection it is immaterial whether the acts of terrorism in question are specific acts of terrorism or acts of terrorism generally



founded on secret evidence and with the lack of procedural safeguards seriously undermine among others; the presumption of innocence.<sup>230</sup>

Therefore, it warrants examining these control orders in detail, which is provided under sections 1-9 of the *PTA 2005*.<sup>231</sup> The said *Act* provides two distinct control orders which are derogating and non-derogating orders.<sup>232</sup> In relation to derogating orders, these are made by the court on the application from the Secretary of State,<sup>233</sup> whereas in regards to non-derogating orders, the Home Secretary must seek the court's permission first to make such orders. Emphasis would be in relation to non-derogating orders rather than derogating orders which, as reported by Lord Carlile has not been made thus far.<sup>234</sup> As such non-derogating orders made by the Secretary of State may potentially contravene the presumption of innocence, despite the inherent mechanism of full hearing in a court of law with an appeal lying therein.<sup>235</sup>

---

<sup>230</sup> Human Rights Watch Briefing Paper, Commentary on Prevention of Terrorism Bill 2005, March 1, 2005, at p. 2

<sup>231</sup> In summary, the sections are as follows: section 1 deals with power to make control orders, section 2 deals with making of non derogating control orders, section 3 deals with supervision by court of making of non derogating control orders, section 4 deals with power of court to make derogating control orders, section 5 deals with arrest and detention pending derogating control order, section 6 deals with duration of derogating control orders, section 7 deals with modification, notification and proof of order, section 8 deals with criminal investigations after making of control order and section 9 deals with offences.

<sup>232</sup> However, in the event of any urgency on the matter, the permission to seek first the courts indulgence can be passed, but the Home Secretary must refer thereafter immediately the court's confirmation. Explanatory Notes to Prevention of Terrorism Act 2005, Crown Copyright 2005

<sup>233</sup> Section 4 of the *PTA 2005*

<sup>234</sup> First Report of the Independent Reviewer Pursuant to Section 14(3) of the *Prevention of Terrorism Act 2005*, (2<sup>nd</sup> February 2006) at p. 16

### 5.5.1 Section 2 of the PTA 2005: Non-Derogating Orders

It is reiterated that non-derogating orders are made by the Secretary of State on reasonable grounds of suspicion on the basis of detailed summaries of evidence and intelligence material which describes not only the activities alleged against the individual and the sources of information, but also the context of terrorism activities in a wider and very complex manner.<sup>236</sup>

Section 2 reads in the following:

The Secretary of State may make such orders if:

- (a) he has reasonable grounds for suspecting that the individual is or has been involved in terrorism related activity and
- (b) considers that it is necessary for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual

Section 1(4) of the *PTA 2005* provides an illustrative list of obligations, which include the following:<sup>237</sup>

- i) restrictions on the possession of specified articles or substances such as a mobile telephone
- ii) restrictions on the use of specified services or facilities such as internet access
- iii) restrictions on work and business arrangements

---

<sup>235</sup> A full hearing by the High Court or Session's Court and a right of appeal on a point of law from the decision of the said courts.

<sup>236</sup> First Report of the Independent Reviewer pursuant to Section 14(3) of the Prevention of Terrorism Act 2005, an independent review by Lord Carlile of Berriew (2<sup>nd</sup> February 2006) at pp 11-12

<sup>237</sup> Human Rights Watch Briefing Paper, Commentary on Prevention of Terrorism Bill 2005, (March 1, 2005) at p. 3



- iv) restrictions on association or communication with other individuals, specified or generally
- v) restrictions on where an individual may reside and who may be admitted to that place
- vi) a requirement to admit specified individuals to certain locations and to allow such places to be searched and items to be removed there from
- vii) a prohibition on an individual being in specified locations at specified time or days
- viii) restrictions to an individual's freedom of movement, including giving prior notice of proposed movements
- ix) a requirement to surrender the individuals passport
- x) a requirement to allow the individual to be photographed
- xi) a requirement to cooperate with surveillance of the individuals movement or communications, including electronic tagging
- xii) a requirement to report to a specified person and specified time and places

The types of non-derogating control orders listed above have adverse effect on a terrorist suspect as it infringes a wide range of rights guaranteed under the *Convention*.<sup>238</sup> In fact Human Rights Watch disagrees with the Home Secretary's stand that these control orders are preventive, they are not, and it is observed that any form of control orders listed above amounts to criminal sanction, which can only be imposed by competent judicial authority and not the Executive.<sup>239</sup> The justification is

<sup>238</sup> Human Rights Watch observes that these could range from rights arising under *Article 5* right to liberty, *Article 8* right to privacy, *Article 10* freedom from expression and *Article 11* freedom from association of the *Convention*. Human Rights Watch Briefing Paper, Commentary on Prevention of Terrorism Bill 2005 (March 1, 2005) at p.3

<sup>239</sup> *Ibid*

further reinforced by the fact that a breach of control order amounts to a criminal offence.<sup>240</sup>

Further there is a danger as to the standard of proof required under the *PTA 2005*, which only requires a reasonable suspicion by the Secretary of State. Clearly, a higher standard of proof is required, akin to the standard in criminal law, which is beyond reasonable doubt.<sup>241</sup> An offence of such magnitude in the instance, surely requires a higher standard of proof and not otherwise, as the Human Rights Watch observes that even the imposition of Anti-Social Behaviour Orders require the criminal standard of proof despite being civil in nature.<sup>242</sup>

It is disturbing that a citizen's liberty lies at the hands of the Executive rather than a judge in relation to non-derogating control orders. This must surely be regarded as the biggest threat to civil liberties in the UK for more than 300 years<sup>243</sup> and as the UK Parliamentary Joint Committee on Human Rights observes:

*"Parliament should take a long view and resist temptation to grant powers to governments' which compromise the rights and liberties of individuals. The situations which may appear to justify the granting of such powers are temporary-the loss of freedom is often permanent."*<sup>244</sup>

---

<sup>240</sup> Section 9 *PTA 2005*

<sup>241</sup> *Woolmington v DPP* [1935] AC 462

<sup>242</sup> The Human Rights Watch in reference to the case of *Clingham v Kensington and Chelsea LBC and R (McCann and others) v Manchester Crown Court* [2002] UKHL 39. Human Rights Watch Briefing Paper, Commentary on Prevention of Terrorism Bill 2005 (March 1, 2005) at p.3

<sup>243</sup> BBC News, Q&A: Terror law row explained ([http://news.bbc.co.uk/1/hi/uk\\_politics/4288407.stm](http://news.bbc.co.uk/1/hi/uk_politics/4288407.stm)), March 12, 2005



## 5.5.2 Safeguards: A Reflection of the Presumption of Innocence

Although *section 2(1) of the PTA 2005* operate to the detriment of terrorist suspects as they may be subject to control orders listed under *section 1(4) of the PTA 2005* based on reasonable suspicion, however, there are safeguards which reflect the presumption of innocence under the *PTA 2005*

### 5.5.2.1 Supervision of the Court

The *PTA 2005* provides within its scheme, a system of review by the court, which is reflected in *section 3 of the PTA 2005* in relation to non-derogating control orders. It requires that in non-urgent cases, the permission of the court should be first obtained before a control order is made, and only in urgent cases for the confirmation of the order. Further, the court is empowered under *section 3(12) of the PTA 2005* to make the following: quash the order, to quash one or more obligations imposed by the order, or to give directions to the Secretary of State for the revocation of the order or for the modification of the obligations imposed by the order.<sup>245</sup> Surely, this mechanism of supervision adopted under the *PTA 2005* provides far better protection for a suspected terrorist as it allows for control orders to be challenged.

<sup>244</sup> Joint Committee on Human Rights, Second Report “Anti-Terrorism, Crime and Security Bill,” November 6, 2001, para 76

<sup>245</sup> First Report of the Independent Reviewer pursuant to Section 14(3) of the Prevention of Terrorism Act 2005, an independent review by Lord Carlile of Berriew (2<sup>nd</sup> February 2006) at p. 15

However, the scope of judicial review is to some extent limited, as the court is only empowered to determine the scope of the exercise of power by the Home Secretary and does not have the mandate to substitute its own findings with that of the Home Secretary. Further, the review of evidence by the court is subject to the nature of the evidence before hand, which may be deemed, classified.<sup>246</sup> Therefore, although control orders can be challenged, the court however in considering whether the proceedings of the case should be conducted in open or closed hearing, must first take into account the nature of the evidence before hand. As such, in most cases, when national security is pleaded, it is a closed hearing that the courts would precede. In such circumstances, the controlled person and his choice of legal representative are excluded from the closed session and a Special Advocate would therefore represent, although not responsible to the controlled person.<sup>247</sup> This is a replicate of the system used in the SIAC.

The use of torture or other methods of oppression may have tainted the secret evidence obtained by the Government to substantiate its claim on reasonable grounds. Further, such evidence are usually regarded as classified material and subject to non-disclosure, which means only one thing, that there is a grave challenge to the presumption of innocence and as Lord Scott observes; “indefinite imprisonment in consequence of a denunciation on grounds that are not disclosed and made by the person whose identity cannot be disclosed is the stuff of nightmares.”<sup>248</sup>

---

<sup>246</sup> Human Rights Watch Briefing Paper, Commentary on Prevention of Terrorism Bill 2005 (March 1, 2005) at p.4

<sup>247</sup> *Id.* 5

<sup>248</sup> *A (FC) and Others (FC) (Appellants) v Secretary of State for the Home department (Respondent); X (FC) and another (FC) (Appellants) v Secretary of State for the Home Department (Respondent)* [2004] UKHL 56, at para 155



Further, there is a clear violation of fundamental rights accorded to the controlled person who is put in a predicament as to the progress of his case. This is apparent especially when the controlled person is unable to have any form of discussion as to the evidence against him or give any form of instructions to the Special Advocate.<sup>249</sup> It is humbly opined that although Lord Carlile may find in practical terms control orders to have an effective protection for national security<sup>250</sup> and that to some degree be modified,<sup>251</sup> but in reality control orders are made in the absence of full disclosure of evidence. Therefore, a person subject to a control order might never know the basis of the Home Secretary's reasonable suspicion of the suspect's involvement in the alleged terrorist activity. This therefore makes any challenge to the lawfulness of the orders very difficult.<sup>252</sup>

Finally, although the control order may only last for 12 months,<sup>253</sup> it may be renewed if the Secretary of State considers that it is necessary for the order to continue in force for purposes connected with protecting members of public from a risk of terrorism, and that any obligations imposed by the renewed order are necessary for purposes connected with preventing or restricting involvement by the controlled person in terrorism related activity.<sup>254</sup> Such indefinite renewal potentially infringes the presumption of innocence. Any form of restriction on liberty following conviction upon the full vigour of the law is justified, but not in the instance! As Human Rights

---

<sup>249</sup> Human Rights Watch Briefing Paper, Commentary on Prevention of Terrorism Bill 2005, (March 1, 2005) at p. 5

<sup>250</sup> First Report of the Independent Reviewer pursuant to Section 14(3) of the Prevention of Terrorism Act 2005, an independent review by Lord Carlile of Berriew (2<sup>nd</sup> February 2006) at p. 9

<sup>251</sup> Section 7 provides for the modification, notification and proof of orders to which the suspect on the basis of a change of circumstances affecting the order may apply for revocation or modification of the obligation imposed by the order which the Secretary of State has a statutory duty to consider pursuant to subsection 2 but such orders are not permitted to be upgraded from a non derogating to a derogating order.

<sup>252</sup> Human Rights Watch Briefing Paper, Commentary on Prevention of Terrorism Bill 2005, (March 1, 2005) at p. 5

<sup>253</sup> Section 2(4) and pursuant to subsection (5) provides that a non derogating control order must states when it will cease to have effect. Contrast section 4(8) which deals with derogating control orders that will last only six months



Watch observes, the restriction imposed under a control order are not for a period pending trial but are an alternative to it, renewable indefinitely and without proper due process safeguards in place.<sup>255</sup>

**5.6 Right to Counsel under Anti-Terrorism Laws**

The right to counsel is regarded as one of the fundamental rights accorded to an accused person and as Hodgson J in *R v Samuel*<sup>256</sup> states;

*‘Perhaps the most important right given (or rather renewed) to a person detained by the police is his right to obtain legal advise.’<sup>257</sup>*

The Right to counsel is reflected under the *Convention* pursuant to *Article 6*<sup>258</sup> and under *section 58 of the Police and Criminal Evidence Act 1984*<sup>259</sup> (hereinafter the ‘*PACE 1984*’). The provisions of the right to counsel are comprehensively phrased and anticipate all possible circumstances.<sup>260</sup> The suspect should be told of his right to

<sup>254</sup> Section 2(6) of the *PTA 2005*  
<sup>255</sup> Human Rights Watch Briefing Paper, Commentary on Prevention of Terrorism Bill 2005, (March 1, 2005) at pp. 6-7  
<sup>256</sup> [1988] Q.B.615  
<sup>257</sup> *Id.* 241  
<sup>258</sup> *Article 6(3)(c)* provides that everyone charged with a criminal offence has the right to defend himself in person or through legal assistance of his own choice or, if he has not sufficient means to pay for legal assistance, to be given it free when the interest of justice so requires.  
<sup>259</sup> The recommendations made by the Philips Royal Commission (Philips Report) was broadly adopted by the Act, the provision reads: A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time, and Code C, paragraph 6.1 (As revised in April 1995) provides: ‘Subject to the provisos in Annex B all people in police detention must be informed that they may at any time consult and communicate privately, whether in person, in writing or by telephone with a solicitor, and that independent legal advice is available free of charge from the duty solicitor.’  
<sup>260</sup> The right extends to include a person at police station voluntarily (Code C, note 1A); juvenile or mentally handicapped or disordered in the former the detainee himself and the following latter through an appropriate adult (Code C, para. 3.13); and terrorist which was introduced following the Report of Lord Jellicoe, review of the Operation of the *Prevention of Terrorism (Temporary Provisions) Act*, Cmnd. 8803 (1983), paras. 108-110 and in Northern Ireland by virtue of the *Northern Ireland (Emergency provisions) Act 1987*, Article 15



have a counsel on arrival at the police station<sup>261</sup> and the custody officer must act on a request for a legal advice without delay.<sup>262</sup> In terrorism cases<sup>263</sup> a suspect is allowed to see a solicitor within 48 hours from the time of his arrest and not from the time of arrival at the police station.<sup>264</sup> The *Code*<sup>265</sup> further provides that police stations advertise the right to legal advice in posters prominently displayed in the charging area, which is rarely the case in Malaysia.

The only possible delay is when the suspect is being questioned for a serious arrestable offence<sup>266</sup> and if the case comes within the ambit of *section 58(8) of the PACEA 1984* and *Annex B of Code C*, which specifies two additional grounds for delaying access to legal advice for terrorism suspects; namely where there are reasonable grounds for believing that it will lead to interference with the gathering of information about the commission, preparation or instigation of acts of terrorism; or by alerting any person, will make it more difficult to prevent an act of terrorism or to secure the apprehension or conviction of someone for a terrorist offence.<sup>267</sup>

Such comprehensive and detailed rules pertaining to the exercise of delay of the right to counsel in the English legal system are never envisaged within our Malaysian legal system. In fact the Home Secretary states that the only reason for delaying access to a legal adviser relates to the risk that he would either intentionally

---

<sup>261</sup> Although section 58 does not directly deal with this point, but it does state that a person is entitled to exercise the right if he has been arrested and is held in a police station. Michael Zander, *The Police & Criminal Evidence Act 1984*, 3<sup>rd</sup> Edi, Sweet & Maxwell (1995) at p 126

<sup>262</sup> Code para. 6.5

<sup>263</sup> For ordinary cases, a suspect must be allowed a solicitor as soon as practicable (section 58 (4) of the *PACEA 1984*) and in any event must be allowed within 36 hours (section 58 (5) of the *PACEA 1984*)

<sup>264</sup> Section 58 (13)(a) of the *PACEA 1984*

<sup>265</sup> Code para 6.3

<sup>266</sup> Defined in section 116 and Schedule 5 of the *PACEA 1984*

<sup>267</sup> Delay has to be authorised by an officer of the rank of superintendent. It can only be authorised where he has reasonable grounds for believing that the exercise of the right:

- (a) will lead to interference with or harm to evidence connected with a serious arrestable offence or interference with or physical injury to other persons; or
- (b) will lead to the alerting off other persons suspected of having committed such an offence but not yet arrested for it; or
- (c) will hinder the recovery of any property obtained as a result of such an offence



or inadvertently convey information to confederates still at large that would undercut an investigation in progress. What a suspect's legal adviser says to him can never be a ground for delaying a consultation between them, nor can anxiety about what the legal adviser might say to the suspect. Delay can be authorised only on the basis of what the legal adviser may do once the consultation has been completed.<sup>268</sup> The courts therefore, treat breach of *section 58 of the PACEA 1984* as a serious matter of law, which may even warrant a conviction being quashed.<sup>269</sup> The right to counsel therefore is regarded as a fundamental right under the *Convention*,<sup>270</sup> applying in both trial and pre-trial proceedings.<sup>271</sup>

In *Murray v United Kingdom*,<sup>272</sup> the court held that in light of the circumstances of this case,<sup>273</sup> counsel's presence is demanding and crucial and to exclude him during questioning constituted a clear violation of *Article 6 of the Convention*.<sup>274</sup> The court further held that where domestic legislation permits such

<sup>268</sup> House of Commons, Hansard, Standing Committee E, Feb. 2, 1984, Col. 1417

<sup>269</sup> In *R v Samuel* [1988] Q.B.615, the Court of Appeal quashed a 10-year prison sentence because the police had refused the suspect access to a solicitor under section 58(8) on the ground that there was a risk that giving the suspect the access to a solicitor would result in accomplices being alerted. The Court held that the right to access to a solicitor was 'a fundamental right off a citizen'. A mere belief that a solicitor might alert other suspects is not enough a justification to warrant a denial as they had to believe that it would be very probable that the solicitor either would commit the criminal offence of alerting other suspects or do so inadvertently or unwillingly.

<sup>270</sup> In *Di Stefano v United Kingdom* [1989] 60 D.R. 182, the lawyer made a bail application on behalf of the accused person, and though there were many consultations during the lengthy period before his trial nevertheless were denied at the earlier stage of investigation. The commission noted that an accused person's right to communicate freely with a lawyer cannot be said to be insusceptible of restriction, and that the general principle of fairness under Article 6 should be the guiding criterion. The comparatively short period, during which the applicant was prevented from seeing his lawyer, after charge, was held not to violate either Article 6(3) (b) or Article 6(3) (c).

<sup>271</sup> The Court in *Imbroscio v Switzerland* [1994] 17 E.H.R.R. 441 held that the right to counsel is not only relevant during trial but extends to cover pre trial proceedings. Here the Court held that the failure on the police and the prosecution to notify the defence counsel of the interrogations with the result that the applicant was questioned in their absence was however remedied when the counsel did attend the final interview and made no objection to the record of the previous interviews.

<sup>272</sup> [1996] 22 E.H.R.R. 29, the decision in *Murray* was accepted with full force by the government and reflected this decision in the passing of the *Criminal Justice (Terrorism and Conspiracy) Act 1998* and the *Youth Justice and Criminal Evidence Act 1999*.

<sup>273</sup> The *Criminal Evidence (Northern Ireland) Order 1988* permits the drawing of adverse inference from a defendant's failure to answer questions in the police station, and /or failure to testify at trial. See similar provision under the *Criminal Justice and Public Order Act 1994*, s 34-37.

<sup>274</sup> *Murray* was arrested under the *Prevention of Terrorism (Temporary Provisions) Act 1989* and whilst being interviewed he stated repeatedly that he had nothing to say, therefore inadvertently exercising



drawing of inferences from a decision of not answering questions in an interview, the right of access to solicitor is of paramount importance. Therefore any substantial delay on any ground will breach the right to a fair trial even though it was carried out lawfully.<sup>275</sup>

However, with the passing of the *ATCSA 2001* and the *PTA 2005*, the right to counsel has to some extent been curtailed. This is apparent as suspected terrorist and his choice of legal representative are excluded from closed hearings and is replaced by a trained and independent lawyer described as a Special Advocate. It is emphasised that the Special Advocate appointed is not responsible to the person whose interest he represents and does not have a duty to take any instruction from the suspect or even discuss evidence or grounds for decision. This is a clear violation of fundamental due process enshrined in the *Convention* and *PACEA 1984* as making a challenge to the lawfulness of the order becomes difficult as the person subject to the order may not be able to defend his case with the counsel of his choice.

---

his right of silence without any advise whatsoever from his counsel as counsel was only allowed after 48 hours and in subsequent interviews thereafter he stated that he was advised by his counsel to remain silent. During several interviews that lasted for 21 hours and 39 minutes over two days, these were the only statement made by the applicant.

<sup>275</sup> *Id.* 66, the court held that the concept of fairness enshrined in Article 6 requires that the accused has the benefit of the assistance of a lawyer... at the initial stage of police interrogation. To deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence may well be irretrievably prejudiced, is-whatever the justification for such denial-incompatible with the rights of the accused under Article 6.



It is therefore observed that both the *ATCSA 2001* and the *PTA 2005* were enacted in light of recent events of terrorist attacks. It is clear that indefinite detention of foreign persons is discriminatory in nature and a clear violation of the presumption of innocence. Although the *ATCSA 2001* provides an opportunity for detainees to be heard in a special tribunal, it is still far convincing as an effective safeguard as it may exclude detainees and their legal representatives from closed proceedings when classified evidence are reviewed.

Further, the control order under the *PTA 2005* is a mere superimposed and masquerading indefinite detention under the *ATCSA 2001* as both measures are a form of detention order, which operate to curtail the liberty of the accused person in its own way. Although the *PTA 2005* is subject to judicial supervision, however, it lacks effectiveness. The control order is made on the basis of reasonable suspicion, founded on secret evidence not disclosed to the suspect and determined not by the judiciary but by politicians. Although it is observed that the justification for control orders is to secure the safety of the State by the minimum measures needed to ensure effective disruption and prevention of terrorist activity,<sup>276</sup> nevertheless, it is without doubt that such measure impose hardship to a suspected terrorist as wide range of rights such as the right to privacy and freedom from expression are curtailed.<sup>277</sup>

Although the sunset clause under the *PTA 2005* relating to control orders is due to expire 12 months since the *Act* was passed,<sup>278</sup> however, there are strong anticipation that the Home Secretary may seek to extend the powers subject to

---

<sup>276</sup> First Report of the Independent Reviewer pursuant to Section 14(3) of the Prevention of Terrorism Act 2005, an independent review by Lord Carlile of Berriew (2<sup>nd</sup> February 2006)

<sup>277</sup> Amnesty International Press Release, The Prevention of Terrorism Bill: A Grave Threat to Human Rights and the Rule of Law in the UK (28 February 2005) (<http://web.amnesty.org/library/index/engneur450052005>)

<sup>278</sup> 10th March 2006



approval of both Houses for the next coming year<sup>279</sup> or at least until the new *Terrorism Bill 2005* is passed.<sup>280</sup> It is alarming that the government of England and Wales seem to actively campaign for a 90 days detention under the proposed *Terrorism Bill*.<sup>281</sup> The justification for a 90-day is based on the fact that it would allow comprehensive and detailed forensic testing and questioning of the suspect.<sup>282</sup> However this was rejected and compromised to 28 days detention period.<sup>283</sup> If the proposed detention period had passed the report stage, this would have meant that suspects arrested under mere suspicion of having conducted, or being engaged in planning, terrorist crimes could be held for such lengthy periods, far more than allowed under *section 73 of the ISA 1960*<sup>284</sup> before being charged with a crime.<sup>285</sup>

## 5.7 Conclusion

It is concluded that a nation which has constantly upheld the rule of law and where its common law approach to national security matters are exemplary,<sup>286</sup> so much so that it was applied to some extent by the courts in Commonwealth

<sup>279</sup> LIBERTY, Protecting Civil Liberties, Promoting Human Rights: Summary of the Prevention of Terrorism Act 2005 ([www.liberty-human-rights.org.uk](http://www.liberty-human-rights.org.uk))

<sup>280</sup> The *Terrorism Bill* was introduced on October 12, 2005 and currently in Parliament's progress

<sup>281</sup> The *Terrorism Act 2000* allows a maximum of 14 days detention

<sup>282</sup> Andy Hayman, Assistant Commissioner of the Metropolitan Police wrote on October 6, 2005 to the Home Secretary that 90 days detention was necessary in the following: The networks are invariably international, indeed global in their origin and span of operation. Enquiries have to be undertaken in many different jurisdictions, many of which are not able to operate to tight timescales; the forensic requirements in modern terrorist cases are far more complex and time consuming than in the past and a feature of major counter terrorist investigations has been that one firm of solicitors will frequently represent most of the suspects. This leads to delay in the investigative process because of the requirement for consultations with multiple clients among others. For further reading see: <http://security.homeoffice.gov.uk/news-and-publications1/publication-search/legislation-publications/met-letter?view=Binary>

<sup>283</sup> The amendment was proposed by David Winnick MP (<http://www.publicwhip.org.uk/dividion.php?date=2005-11-09&number=85>)

<sup>284</sup> Section 73 provides a maximum of 60 days

<sup>285</sup> <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/515/51011088.htm>

<sup>286</sup> Malik Imtiaz Sarwar & Christopher Leong Sau Foo, National Security & Fundamental Liberties: Are the Courts Striking the Right Balance? 11<sup>th</sup> Malaysian Law Conference (8-10 November 2001) Kuala Lumpur, Malaysia, at p. 50



countries,<sup>287</sup> is today no longer regarded as a model of human rights culture. The passing of the *ATCSA 2001*, the *PTA 2005* and the proposed *Terrorism Bill* are evidences of a new trend emerging from the Westminster Parliament disregarding fundamental rights and liberties.

Although much has been said of the chilling effect of such laws, nevertheless, it provides effective safeguards as compared to the *ISA 1960*. These laws are subject to immense scrutiny by both the Houses before being adopted as an Act of Parliament and are subject to review by a court of law when questions of incompatibility under the Convention on Human Rights are raised.<sup>288</sup> It is further observed that whenever English judges are faced with questions of terrorism laws, they take a forceful approach in upholding fundamental rights and liberties of an accused person. However, it is submitted that although the safeguards offered to an accused person under such laws are comparatively far effective as offered to an *ISA* detainee, nevertheless, it remains that the scope of judicial review is always curtailed to some degree when determining the merit of the imposition of control orders. The accused may never get a right to be tried by an independent and impartial court, with a counsel of his choice, and full access to all evidence against him to mount a successful challenge.

However it is evident that this majestic safeguard has been curtailed to great extent under anti-terrorism laws, which empower the Executive to order indefinite detention orders under the *ISA 1960*, *ATCSA 2001* and control orders under the *PTA 2005*. Further such laws may effectively deny or even deny an accused right to counsel or can even exclude the choice of legal representative of the accused. It is reiterated that any form of restriction on the liberty of an accused person is not for the Executive to decide, but for the judiciary, through full vigour of the criminal process.

---

<sup>287</sup> The Federal Court of Malaysia in the case of *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 applied the decision of the House of Lords in *Liversidge v Anderson* [1942] AC 206

<sup>288</sup> See the case of *A (FC) and others (FC) (Appellants) v Secretary of State for the Home Department (Respondent)* [2004] UKHL 56



## CHAPTER 6

### CONCLUSION

“Be the change that you want to see in the world”<sup>289</sup>

The government of all nations seem to refuse to acknowledge a basic truth; punishment without trial is unacceptable, no matter what. Placing limitations such as curtailing the presumption of innocence, which fashions due process is an option available under these anti-terrorism laws, but it won't address the culmination of the breakdown of law and order in failing to observe due process of law. The presumption of innocence is regarded as the cornerstone of the criminal justice system and a central safeguard embraced under due process, which if not observed, may only lead to a victory for intolerance and injustice. The presumption of innocence as such, is accorded universal recognition and finds its place at the heart of the legal jurisprudence of Malaysia, and England and Wales vide the *Federal Constitution* and the *Convention*.

However it is evident that this majestic safeguard has been curtailed to great extent under anti-terrorism laws, which empower the Executive to order indefinite detention orders under the *ISA 1960*, *ATCSA 2001* and control orders under the *PTA 2005*. Further such laws may effectively delay or even deny an accused right to counsel or can even exclude the choice of legal representative of the accused. It is reiterated that any form of restriction on the liberty of an accused person is not for the Executive to decide, but for the judiciary, through full vigour of the criminal process.

<sup>289</sup> The post September 11 attack had extended the use of the ISA to religious and militant activists predominantly over three distinct groups: The KMM, Islamic Malaysia (IM) and all those who had ties with the Malaysian Islamic Movement in Um Thaur. Islam Human Rights Watch Background: The

<sup>289</sup> Mahatma Gandhi

As recent events of terrorist attacks have greatly influenced world leaders to push for further restrictive anti-terrorism laws that has far reaching consequences and in Malaysia with the justification that the *ISA 1960* is a necessary tool to counter terrorism, the need for judicial safeguards and adherence to fundamental rights of due process becomes apparent. Comparatively, both Malaysia and England and Wales share similarities as both Governments had fought terrorism in the past, and as such have abundance of terrorism laws to curb the current global threat without the need for further legislation.

However, despite such laws, the Government of England and Wales introduced new anti-terrorism measures and a new lease of life was given to *the ISA 1960* in the aftermath of September 11, 2001 attack.<sup>290</sup> However, comparatively, although the *ATCSA 2001*, the *PTA 2005*<sup>291</sup> and the *ISA 1960* provide within its scheme; preventive detentions, anti-terrorism laws passed by the Government of England and Wales provide far effective safeguards in preserving the presumption of innocence under such laws, as compared to the *ISA 1960* of Malaysia.

The *ISA 1960* unlike the *PTA 2005* provides no recourse for judicial review, and therefore deprives a person's liberty indefinitely without trial solely for preventive reasons. Further, both the Advisory Board and the SIAC may exclude a detainee and their legal representative when classified evidence are reviewed, however, in relation to a detainee under the *ATCSA 2001* he may lodge an appeal to a court on the lawfulness of the derogation and hence the detention itself. Further, the Advisory Board as compared to the SIAC does not effectively discharge its duty as a body of review. Although the powers under the *ISA 1960* in relation to police

---

<sup>290</sup> The post September 11 attack had extended the use of the *ISA* to religion and militant activist's prominently over three distinct groups: The KMM, Jemaah Islamiyah (JI) and all those who had ties with the Madrassah Luqmanul Hakiem in Ulu Tiram, Johor. Human Rights Watch, Background: The *ISA* in Law and Practice ([www.hrw.org](http://www.hrw.org))



detention is now subject to judicial review, nevertheless, much is left desired as Ministerial detention orders still fall outside the scope of judicial review. *The PTA 2005* on the other hand is subject to judicial supervision but it lacks effectiveness. The control order is made on the basis of reasonable suspicion, founded on secret evidence not disclosed to the suspect and determined not by the judiciary but by politicians.

As such these anti-terrorism law no matter what safeguards they envisage, significantly erode the presumption of innocence. This is where the judiciary's role as the 'ultimate bulwark' and protector of individual rights and freedom become apparent as it is the principle of law that every man is declared innocent until he is pronounced by a competent court of law to be guilty. The duty of keeping a fine balance between the interest of society and that of the individual is entrusted to the Judiciary. In the words of the former Chief Justice of India, PN Bhagwati; the task in a democracy governed by the rule of law is entrusted to the judiciary and it is the judiciary, which has to find a dividing line so as to harmonize the two interests without over emphasizing one to the detriment of the other.<sup>292</sup>

However, comparatively the Malaysian Judiciary should take cognisance of the English Court's decision to be stalwarts of fundamental liberties. Despite the turn of events which lead to the curtailment of judiciary's power of review under *the ISA 1960* paralleled by unsatisfactory judicial ruling of the court, its time that the judiciary restore their image as guardians of civil liberties by shifting the pendulum in favour of protecting the rights of an accused person arrested under such laws regarded as draconian in nature.<sup>293</sup>

---

<sup>291</sup> Although the *PTA 2005* provides for control orders, these can taken as preventive in nature

<sup>292</sup> Kumarappa-Lecture delivered at the TATA Institute of Social Sciences, Bombay, on 23 February 1985. Also found in Noorjahan Baya, *Human Rights and Criminal Justice Administration of India* (2000) New Delhi, Upal Publishing House at p 11-12.

<sup>293</sup> Tun Salleh Abas in *Lim Kit Siang v Dato' Seri Dr Mahathir Mohamad* [1987] 1 MLJ at p387 held that it is therefore the courts, who are the final arbiter between the individual and the state and in

7.8 Respect for the presumption of innocence in State governance and law enforcement is the only sure way of ensuring public confidence and support as we move forward towards a develop and progress nation. For that reason, it is essential that the principles of the *UDHR 1948* should be observed and respected in State governance and law enforcement. This would fulfil the promise of our Proclamation of Independence. Although the presumption of innocence is embedded under *Article 5 (1) of the Federal Constitution*, however such rights arising under the provision may never stand the test of time, especially with the growing number of anti-terrorism laws passed. Therefore an imperative call for change is warranted in light of the above discussed.

Some forms of recommendations in the following are therefore proposed:<sup>294</sup>

1. A Constitutional Court to hear such matters and modelled within the framework of the European Court of Human Rights. The composition of the court should include Federal Court judges, or
2. An independent specialised tribunal is proposed. The composition of the tribunal should include the same as abovementioned.
3. The Human Rights Commission should be empowered to hear infringements of such fundamental rights
4. Effective right to counsel during police detention<sup>295</sup>
5. Empower the Advisory board with powers to order release of detainees
6. Strengthen the scope of judicial review, including the application of habeas corpus

---

performing their constitutional role, the courts must of necessity and strictly in accordance with the Constitution and the law be the ultimate bulwark against unconstitutional legislation's or excesses in administrative action.

<sup>294</sup> Note: These recommendations are specifically in reference to the *ISA 1960* and there has been abundance of recommendations proposed since the inception of the *ISA 1960*, notable ones include recommendations made by the Human Rights Watch, for further reading see: Human Rights Watch, Vol. 16, No 7 (c) , at pp. 54-55

<sup>295</sup> The Bar Council recommends that all person be given the right to immediate legal representation upon detention. Roy Rajasingham, Vice Chairman, Bar Council. Press Statement 31 May, 2001



7. Set up a Parliamentary Select Committee, quite similar to the one under the *ACTSA 2001* which would allow Parliament to scrutinise any potential abuse of power by the Executive
8. To educate law enforcement agencies as to the importance of observing human rights in the course of discharging their duties
9. To allow a judicial officer to conduct random checks on *ISA* detainees so as to avoid any concealment of threats and physical abuse by enforcement authorities

Such measures are proposed in light of the facet of obscurity in the criminal justice system in light of anti-terrorism laws. Such laws reduce these constitutional safeguards to pious platitudes with no legal effect, leaving the road to tyranny open.<sup>296</sup> It is therefore emphasised that until recourse to trial is made available to detainees under preventive detention, the issue as to guilt or innocence would remain largely in doubt.<sup>297</sup>

Preventive detentions and control orders, by their very nature challenge and undermine the presumption of innocence and this was evident with the Belmarsh detainees.<sup>298</sup> Kate Allen the director of Amnesty International in meeting the two detainees<sup>299</sup> said that both men expressed profound sense of injustice that their liberty had been taken from them without ever being charged, tried or shown any evidence against them.”<sup>300</sup> However desired, the justification accorded by the Executive is that

<sup>296</sup> Jerald Gomez Advocate and Solicitor High Court of Malaya. Rights of Accused person –Are safeguards Being Reduced? Paper presented at the 12<sup>th</sup> Malaysian law Conference held in Kuala Lumpur from 10<sup>th</sup>- 12<sup>th</sup> December 2003

<sup>297</sup> Human Rights Watch, In the Name of Security: Counterterrorism and Human Rights Abuses under Malaysia’s Internal Security Act, May 2004, Vol.16, No.7(c) p 52

<sup>298</sup> A (FC) and others (FC) (Appellants) v Secretary of State for the Home Department (Respondent) [2004] UKHL

<sup>299</sup> Palestinian Mahmoud Abu Rideh and an Algerian man known as ‘H’

<sup>300</sup> Nigel Morris, Home Affairs Correspondent, Enemies of the State? Police fail even to question men held as a terror threat, Suspected of plotting terror, a group of men have been held for four years but never charged. Now, in their first testimonies, they reveal the authorities have not even questioned them since their arrest.

such measures are necessary to combat terrorism and in the words of learned Ramdas Tikamdas; the Executive would justify such laws as a necessity to defend freedom but the record of its use, rather misuse, in recent history betrays the fact that the so-called cure can be indistinguishable from the disease.<sup>301</sup>

Thus, the administration of criminal justice system encompasses that an accused person is well protected from arbitrary powers of the State and one such safeguard is the presumption of innocence. This right to be presumed innocent however under anti-terrorism laws to a large extent has been curtailed for the sake of protecting the security of the State. This right should never be compromised! It is emphasised that there must be a willingness on the part of the government to recognise that absolute disregard to fundamental rights would only lead to potential abuse of powers as absolute power in the absence of effective safeguard only lead to absolute decay of democratic and civil society.

---

(15 December 2005)  
<http://news.independent.co.uk/uk/legal/article333258.ece>

<sup>301</sup> Ramdas Tikamdas, National Security and Constitutional Rights-The Internal Security Act 1960. ([www.malaysianbar.org.my](http://www.malaysianbar.org.my))



## BIBLIOGRAPHY

- Amnesty International, Malaysia: Towards Human Rights-Based Policing, 7<sup>th</sup> April 2005  
<<http://web.amnesty.org/library/index/ENGASA280012005>>
- Andrew Sanders and Richard Young, Criminal Justice (2<sup>nd</sup> ed., 2000) Butterworth
- Amer Hamzah bin Arshad, Rights of Accused Person: Are Safeguards Being Reduced? Infoline, Human Writes Issue 7 Jan/Feb 2004
- Abdul Haseeb Ansari. Terrorism, National Integrity and Human Rights: A Critical Appraisal, (2002) 3 MLJ
- Amnesty International Report Malaysia, Human Rights Undermined: Restrictive Laws in a Parliamentary Democracy. 1 Sept 1999. Amnesty International Report on ISA (SUARAM)  
<[file:///A:/Abolish ISA Movement.htm](file:///A:/Abolish%20ISA%20Movement.htm)>
- Amnesty International Press Release, The Prevention of Terrorism Bill: A Grave Threat to Human Rights and the Rule of Law in the UK (28 February 2005)  
<<http://web.amnesty.org/library/index/engneur450052005>>
- Ben Emerson QC & Andrew Ashworth QC, Sweet & Maxwell (2001)
- BBC News, Q&A: Terror law row explained, March 12, 2005  
<[http://news.bbc.co.uk/1/hi/uk\\_politics/4288407.stm](http://news.bbc.co.uk/1/hi/uk_politics/4288407.stm)>
- Clive Walker, Terrorism and Criminal Justice: Past, Present and Future (2004) Crim.L.R
- Dworkin, Taking Rights Seriously, (1977) Harvard University Press
- Dr. Mahathir Calls for Global Definition, Action Against Terrorism, Kuala Lumpur, April 1 (Bernama) Ministry of Foreign Affairs Malaysia
- Edmund Bon, Terrorizing the Terrorists, Paper presented at the Public Forum on 'Anti-Terrorism Laws and National Security' on 8 December 2003 jointly organized by the Bar Council, SUARAM & HAKAM. The Malaysian Bar, <[www.malaysianbar.org.com](http://www.malaysianbar.org.com)>
- Explanatory Notes to Prevention of Terrorism Act 2005, Crown Copyright 2005
- First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005, 2<sup>nd</sup> February 2006
- Herbert L. Packer, The Limits of the Criminal Sanction, (1978) Stanford University Press
- Have A Common Understanding of Threats of Terrorism, Asean Told, Kuala Lumpur, May 20 (Bernama)
- Human Rights Watch, In the Name of Security: Counterterrorism and Human Rights Abuses under Malaysia's Internal Security Act, May 2004, Vol.16, No.7(c)
- Human Rights Watch, Country Summary (January 2006)  
<[www.hrw.org](http://www.hrw.org)>
- Human Rights Watch Briefing Paper, Neither Just nor Effective, Indefinite Detention Without Trial in the United Kingdom Under Part 4 of the Anti-Terrorism, Crime and Security Act 2001 (June 24, 2004) Human Rights Watch
- Human Rights Watch Briefing Paper, Commentary on Prevention of Terrorism Bill 2005, March 1, 2005
- Human Rights Watch, Background: The ISA in Law and Practice  
<[www.hrw.org](http://www.hrw.org)>
- H. Fenwick, The Anti terrorism, Crime and Security Act 2001 (2002) 65 M.L.R. 724
- House of Commons, Hansard, Standing Committee E, Feb. 2, (1984) Col. 1417



- Jerald Gomez, Advocate and Solicitor High Court of Malaya., Rights of Accused Person –Are safeguards Being Reduced? (2004) 1MLJ xx, (2004) 1 MLJA 20
- John Wadham & Helen Mountfield, Blackstone's Guide To The Human Rights Act 1998 (2<sup>nd</sup> ed 2000)
- James R. Elwood & Jarret B. Woostein, Dictatorship At Your Doorstep. Why "Anti-Terrorism" Laws Threaten You. (May 2002)  
<<http://www.isil.org/resources/lit/dictatorship-at-doorstep.html#author>>
- Joint Committee on Human Rights, Second Report "Anti-Terrorism, Crime and Security Bill," November 6, (2001)
- Kenneth Pennington, Innocent Until Proven Guilty: The Origins of a legal Maxim. Papal Justice and Due Process. Published in A Ennio Cortese, 3 Volumes. Roma: II Cigno Galileo Galilei Edizioni, (2001)
- Kumarappa-Lecture delivered at the TATA Institute of Social Sciences, Bombay, on 23 February 1985. Also found in Noorjahan Baya, *Human Rights and Criminal Justice Administration of India* (2000) New Delhi, Upal Publishing House
- Legislation against terrorism (Cm.4178, London, 1998)
- Lindy Chamberlain, Norman H. Young Innocence Regained the Fight to Free. The Federation Press (1989)
- LIBERTY, Protecting Civil Liberties, Promoting Human Rights: Summary of the Prevention of Terrorism Act 2005  
<[www.liberty-human-rights.org.uk](http://www.liberty-human-rights.org.uk)>
- Mimi Kamariah Majid, Criminal Procedure in Malaysia (Third ed, 1999) University of Malaya Press
- Mohammad Shabbir, Outlines of Criminal Law and Justice in Islam, International Law Book Services
- Malaysia's Internal Security Act and Suppression of Political Dissent, A Human Rights Watch Backgrounder, Human Rights Watch  
<<http://hrw.org/backgrounder/asia/malaysia-bck-0513.htm>>
- Michael Zander, The Police & Criminal Evidence Act 1984, (3<sup>rd</sup> Edi), Sweet & Maxwell (1995)
- Malik Imtiaz Sarwar & Christopher Leong Sau Foo, National Security & Fundamental Liberties: Are the Courts Striking the Right Balance? 11<sup>th</sup> Malaysian Law Conference (8-10 November 2001) Kuala Lumpur, Malaysia
- Nigel Morris, Home Affairs Correspondent, Enemies of the State? (15 December 2005)  
<<http://news.independent.co.uk/uk/legal/article333258.ece>>
- Prof S.P. Srivastave., Prof (Dr) Noorjahan bava. Human Rights and Administration of Criminal Justice in India, Human Rights and Criminal Justice Administration in India (ed) (2000) Delhi, Upal Publishing House
- Prof Wu Min Aun, Human Rights and Law Enforcement. Keynote Address at Conference on Human Rights and the Administrative of Law Kuala Lumpur 9-10 Sept 2003.  
<<http://www.cdu.edu.au/law/staff/wu/wu2.htm>>
- Privy Counselor Review Committee, "Anti-terrorism, Crime and Security Review,"
- Rais Yatim, Freedom under Executive Power in Malaysia: A Study of Executive Supremacy (1995) Endowment Publications Kuala Lumpur.
- Ramdas Tikamdas, National Security and Constitutional Rights-The Internal Security Act 1960.  
<[www.malaysianbar.org.my](http://www.malaysianbar.org.my)>



- Roy Rajasingham, Vice Chairman, Bar Council. Press Statement 31 May, 2001
- Steven Greer, Preventive Detention and Public Security-Towards a General Model, (Andrew Harding & John Hatchard, Preventive Detention & Security Law. A Comparative Study: International Studies in Human Rights. Volume 31 (Martinus Nijhoff Publishers)
- Smith, "The presumption of innocence" (1987) 38 NILQ 223
- Sarah Stephen, Muslim denied presumption of innocence. Green left Weekly, November 16, 2005
- StarMag, Sunday 6 March 2005
- Secretary of State for the Home Department of 18 November 2003, Home Department-Anti terrorism, Crime and Security Act (Detentions), Hansard, Column 27 WS
- Tan, Yeo & Lee's, Constitutional law in Malaysia & Singapore (2<sup>nd</sup> ed). Kevin YL Tan, Thio Li-ann, Butterworths Asia (1997)
- Tun Mohamed Dzaiddin Abdullah, National Security Considerations under the Internal Security Act 1960-Recent Developments, First presented at a conference on "Constitutionalism, Human Rights and Good Governance" at Kuala Lumpur on 30 Sept to 1 Oct 2003
- Third Commons debate  
<<http://www.theyworkforyou.com/debates/?id=2005-03-10.1854.3>>
- William Blackstone, Commentaries on the Laws of England, vol. 4, of Public Wrongs (1769)
- Williams, Proof of Guilt  
<<http://www.historycooperative.org/journals/1hr/23.1/smith.htm1>>
- Wade and Bradley: Constitutional and Administrative Law, Edited by A.W. Bradley & Keith Ewing (11<sup>th</sup> Edition) ELBS

## Useful Websites

- <<http://www.opsi.gov.uk/acts/acts2001/20010024.htm>>
- <[http://en.wikipedia.org/wiki/Anti-terrorism%2C\\_Crime\\_and\\_Security\\_Act\\_2001](http://en.wikipedia.org/wiki/Anti-terrorism%2C_Crime_and_Security_Act_2001)>
- <<http://security.homeoffice.gov.uk/news-and-publications1/publication-search/legislation-publications/met-letter?view=Binary>>
- <<http://www.publicwhip.org.uk/dividion.php?date=2005-11-09&number=85>>
- <<http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/515/51011088.htm>>